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In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

LORRAINE POLASKI, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

This case, on remand for reconsideration in light of this Court's decision in *Bowen* v. *City of New York*, No. 84-1923 (June 2, 1986), is an Eighth Circuit-wide class action brought under 42 U.S.C. 405(g) to challenge the Secretary's policies regarding the manner in which allegations of pain are evaluated in determining whether a claimant is eligible for Social Security disability benefits. The question presented is whether the court of appeals erred in requiring the Secretary to reopen the claims of thousands of class members, even though (i) Congress ratified and the court of appeals sustained the challenged policies, and (ii) the class members involved knowingly abandoned their claims when they failed to seek administrative review of the preliminary decisions denying their claims.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the other parties to these proceedings in the courts below were Patrick Blaschko, an intervenor, and the following class of plaintiffs certified by the district court (App. 54a-55a):

> All persons residing in Minnesota, North Dakota, South Dakota, Missouri, Nebraska, Iowa, or Arkansas,
>
> a) who have been or will be notified that their applications for Title II and/or/Title XVI benefits have been denied or that their Title II and/or Title XVI benefits are being terminated on medical or medical vocational grounds; and
>
> b) who allege that they are unable to work in whole or in part because of pain or other subjective complaints and/or that their medical condition has not improved; and
>
> c) who are pursuing or will pursue timely administrative or judicial appeals, or, if not pursuing timely appeals, who have received or will receive an adverse decision at any level of the administrative review process on or after January 30, 1984, provided however that,
>
> > (1) as to those who are residents of Arkansas and who have been or will be notified that their applications for Title II and/or Title XVI benefits have been denied, the class includes only (a) those who are pursuing or will pursue timely judicial appeals and (b) those who are pursuing timely administrative appeals at the Administrative Law Judge or Appeals Council level, and (c) those who received or will receive an adverse decision at the Administrative Law Judge or Appeals Council level on or after February 20, 1984;

(2) as to those who are residents of Arkansas and who have been terminated from Title II and/or Title XVI benefits, the class also includes those who have received or will receive an adverse decision at any level of the administrative review process on or after February 12, 1983; and

(3) as to those who are residents of Iowa and who have been or will be notified that their applications for Title II and/or Title XVI benefits have been denied, the class also includes those who have received an adverse decision at any level of the administrative review process on or after November 26, 1983; and

(4) as to those who are residents of Iowa and who have been or will be terminated from Title II and/or Title XVI benefits, the class also includes those who have received or will receive an adverse decision at any level of the administrative review process on or after January 13, 1982,

(d) provided, further, however, that the class of persons whom plaintiffs represent shall exclude persons who are members of class actions which have been certified in any court in the Eighth Circuit which challenge the Secretary's policy with regard to a medical improvement standard or the evaluation of pain and other subjective complaints; provided that such persons shall be excluded from this class only with regard to the issue or issues actually being litigated in such other certified class actions.[1]

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[1] The claims of the members of the certified class who had been receiving benefits but whose benefits were terminated were remanded to the Secretary for reconsideration pursuant to Section 2 of the Social Security Disability Benefits Reform Act of 1984 (98 Stat. 1794), and the court of appeals dismissed that portion of the class action (App. 9a-11a). Those individuals therefore are no longer parties to these proceedings.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The memorandum opinion of the court of appeals on remand from this Court (App. 1a-2a) is reported at 804 F.2d 456. Prior opinions of the court of appeals (App. 4a-29a, 30a-34a) are reported at 751 F.2d 943 and 739 F.2d 1320, respectively. The orders of the district court (App. 35a-48a, 49a-84a) on matters pertaining to the class are reported at 585 F. Supp. 997 and 585 F. Supp. 1004, respectively. The orders of the district court remanding the individual claims of respondents Polaski and Blaschko to the Secretary (App. 85a, 94a-98a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1986. The order denying the Secretary's peti-

tition for rehearing was entered on January 8, 1987 (App. 3a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. 405(g) and Section 3 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460 (98 Stat. 1799) are reproduced at App. 102a-106a.

STATEMENT

This is an Eighth Circuit-wide class action brought pursuant to 42 U.S.C. 405(g) to challenge the policies of the Secretary of Health and Human Services regarding the manner in which a claimant's allegations of pain are evaluated in determining whether he is entitled to disability benefits under the Social Security Act. Although the court of appeals sustained the Secretary's policies, it ordered the Secretary to reopen the claims of thousands of class members who failed to pursue their administrative remedies after their claims were initially denied.

A. The Statutory And Regulatory Framework

1. *Procedural Provisions*

Congress has directed that the determination whether an individual is under a disability shall be made in the first instance by a state agency, pursuant to regulations, guidelines, and performance standards established by the Secretary. 42 U.S.C. (& Supp. III) 421(a), 1383b(a); 20 C.F.R. 404.1503, 416.903; *Bowen* v. *City of New York*, No. 84-1923 (June 2, 1986), slip op. 3. If the state agency determines that a new applicant is not disabled or that the disability of a current recipient has ceased, the individual may request a de novo reconsideration by the state agency. The claimant is personally informed that he must request

reconsideration within 60 days of his receipt of the adverse initial determination (20 C.F.R. 404.904, 404.909(a)(1), 416.1404, 416.1409(a); see, *e.g.*, P. Tr. 167; B. Tr. 94[2]), and that determination becomes binding upon him if he does not do so. 20 C.F.R. 404.905, 416.1405.

If an individual is dissatisfied with the state agency's decision after reconsideration, he "shall be entitled to a hearing thereon by the Secretary" (42 U.S.C. (Supp. III) 421(d); see also 42 U.S.C. 1383(c)(1)). The Act requires—and the claimant is personally notified (see, *e.g.*, P. Tr. 169; B. Tr. 92)—that he must request a hearing before an administrative law judge (ALJ) within 60 days of his receipt of the state agency's reconsideration decision (42 U.S.C. (Supp. III) 405(b)(1); 42 U.S.C. 1383(c)(1)). The latter decision is binding upon the claimant if he does not timely request an ALJ hearing. 20 C.F.R. 404.920, 404.921(a), 404.933(b), 416.1404(b)(3), 416.1405, 416.1420, 416.1421(a), 416.1433(b).

If the ALJ's decision is adverse to the claimant, he then may seek review by the Appeals Council in the Social Security Administration. If a claimant does not request such review within 60 days, the adverse ALJ decision is binding. 20 C.F.R. 404.955(a), 404.968(a)(1), 416.1455(a), 416.1468. Each claimant is personally informed that he must seek Appeals Council review within 60 days. See, *e.g.*, P. Tr. 23; B. Tr. 8. It is only after the Appeals Council has denied review, or has granted review and issued its own decision, that the Secretary has rendered his "final decision" on the individual's claim for benefits, which then is subject to judicial review pursuant to 42 U.S.C. 405(g). See 42 U.S.C. (& Supp. III) 421(d), 1383(c)(3); 20 C.F.R. 404.900(a)(5), 404.981, 416.1400(a)(5), 416.1481, 422.210.

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[2] "P. Tr." refers to the transcript of the administrative record on the claim of the class representative, Lorraine Polaski. "B. Tr." refers to the transcript of the administrative record on the claim of intervenor Patrick Blaschko.

2. *Substantive Provisions*

Under both Title II and Title XVI of the Social Security Act, the term "disability" is defined to mean the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" that can be expected to result in death or to last for 12 months. 42 U.S.C. 423(d)(1)(A), 1382c(a)(3)(A). The impairment must "result[] from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. 423(d)(3), 1382c(a)(3)(C). See *Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976).

Implementing regulations provide that a claimant will not be found to be disabled under these statutory standards on the basis of his symptoms, including pain, "unless medical signs or findings show that there is a medical condition that could be reasonably expected to produce those symptoms." 20 C.F.R. 404.1529, 416.929. The Social Security Administration (SSA) elaborated upon this regulation in Social Security Ruling (SSR) 82-58, which was issued in 1982. SSR 82-58 explains that symptoms may impose limitations beyond those indicated by objective medical findings and that the decisionmaker therefore must assess the impact of pain or other symptoms on the claimant's residual functional capacity to work. In making that assessment, SSR 82-58 requires consideration of both subjective and objective factors, including the claimant's allegations concerning the frequency and duration of the pain, the effect of the pain on the claimant's daily activities, the mitigating effect of medication, and recorded observations about the pain by examining physicians and SSA personnel. Gov't C.A. Addendum D.

B. The Proceedings In This Case

1. Respondent Polaski received Title II disability benefits beginning in 1979 (App. 36a). Her eligibility sub-

sequently was reviewed, and the state agency determined that her disability had ceased as of June 1982 because she was then able to engage in substantial gainful activity (P. Tr. 166). The state agency's decision was affirmed on reconsideration (P. Tr. 169), and the ALJ rendered a decision to the same effect after a hearing (P. Tr. 23-30). The ALJ expressly recognized that Eighth Circuit precedent permitted a finding of disability based on the claimant's subjective complaints of pain (P. Tr. 28). But the ALJ stressed that symptoms, including pain, are insufficient to establish disability unless medical findings or signs show that there is a medical condition that could reasonably be expected to produce those symptoms. The ALJ further emphasized that the mere assertion of pain does not foreclose inquiry into whether the claimant's complaints are credible. After reviewing the evidence under these principles, the ALJ concluded that "the record does not establish the existence of pain of such intensity and frequency so as to preclude [Polaski] from engaging in all types of competitive work activity" and that she could work in a "relatively low-stress, 'unskilled' work environment" (*ibid.*). The Appeals Council denied review of the ALJ's decision on November 28, 1983 (P. Tr. 6-7).

2. Polaski filed this civil action in January 1984 in the United States District Court for the District of Minnesota pursuant to 42 U.S.C. 405(g), seeking review of the Secretary's final decision that her disability had ceased. Polaski later sought to amend her complaint to represent a class of claimants in the Eighth Circuit. Polaski alleged that the Secretary was "nonacquiescing" in Eighth Circuit case law with respect to (i) the evaluation of subjective complaints of pain, and (ii) a requirement that the Secretary find improvement in a recipient's medical condition before terminating that person's disability benefits (App. 36a).

By order dated April 17, 1984, the district court granted Polaski's motion to amend the complaint, certified an Eighth Circuit-wide class, and entered a Circuit-wide temporary restraining order (App. 35a-48a).[3] The class is defined to include all persons residing in the Eighth Circuit who have been or will be notified that their applications for disability benefits have been denied or that their benefits have been terminated; "who allege that they are unable to work in whole or in part because of pain or other subjective complaints and/or that their medical condition has not improved"; and "who are pursuing or will pursue timely administrative or judicial appeals, or, if not pursuing timely appeals, who have received or will receive an adverse decision at any level of the administrative review process on or after January 30, 1984" (App. 54a-55a).[4] In a subsequent order dated April 27, 1984, the district court

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[3] The district court also granted the motion of Patrick Blaschko to intervene (App. 37a). Blaschko, like Polaski, was a prior recipient of disability benefits whose benefits were terminated. After the Appeals Council denied Blaschko's request for review (B. Tr. 3-4), he sought judicial review in the district court on March 15, 1983. *Blaschko* v. *Heckler,* Civil No. 4-83-233 (D. Minn.). His action was assigned to a different judge (Murphy, J.) than the judge who decided the instant case (Lord, C.J.). On March 7, 1984, Judge Murphy remanded Blaschko's individual case to the Secretary for further proceedings in accordance with a magistrate's report that concluded that the ALJ had incorrectly discredited Blaschko's subjective complaints of pain (App. 94a-98a). Thus, Blaschko's individual action had already been resolved by a different judge when the district court permitted him to intervene in the instant case. On January 12, 1985, the Appeals Council rendered a decision fully favorable to Blaschko.

[4] The latter date was selected to comply with the requirement in 42 U.S.C. 405(g) that a claimant seek judicial review within 60 days of the Secretary's final decision on his claim for benefits (App. 26a). The district court adopted beginning dates other than January 30, 1984 for class members in Arkansas and Iowa, concluding that the running of the 60-day period had been tolled by the filing of separate class actions in those States (*id.* at 53a & n.1, 54a-55a). See pages II-III, *supra.*

rejected the Secretary's contention that the class could not include any persons who had failed to exhaust their administrative remedies, as required by 42 U.S.C. 405(g) (App. 51a-52a).

On the merits, the district court concluded that the Secretary's policies for the evaluation of pain embodied in 20 C.F.R. 404.1529 and SSR 82-58 were invalid (App. 59a-65a) and that the Secretary erroneously had terminated benefits without a finding of medical improvement (*id.* at 65a-68a). The court therefore entered a "preliminary injunction" that directed the Secretary: (i) to notify new-applicant class members who then had administrative appeals pending that they were entitled to have their claims considered under what the court defined as the "proper" pain standard and to submit additional evidence under that standard; and (ii) to notify class members whose applications had been denied and who did *not* have a timely appeal pending that they were entitled to have their claims reopened and readjudicated under the same conditions. The court ordered similar injunctive relief for class members whose benefits had been terminated (*id.* at 76a-84a).

3. The Secretary appealed the district court's order entering the preliminary injunction.[5] Because the Secretary maintained on appeal that the Department had been applying standards for the evaluation of pain that were consistent with Eighth Circuit law (see C.A. Br. 18-26), the court of appeals, after oral argument, suggested that the parties try to reach agreement on the appropriate standards (App. 31a). The parties thereafter did reach agreement (*id.* at 32a-33a), and on July 17, 1984, the court of appeals approved that agreement as a correct restatement of Eighth Circuit precedent (*id.* at 30a-34a).

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[5] The court of appeals granted a stay pending appeal (App. 31a), and that stay has remained in effect throughout these proceedings with respect to the class members at issue here.

The court of appeals issued its decision on the remaining issues in the case on December 31, 1984 (App. 4a-29a). In the meantime, Congress had enacted the Social Security Disability Benefits Reform Act of 1984 (Pub. L. No. 98-460, 98 Stat. 1794 *et seq.*), which had a direct bearing on both the "medical improvement" and "pain" issues.

a. In Section 2(a) of the 1984 Act (98 Stat. 1794), Congress enacted standards for determining whether a person's disability benefits should be terminated on grounds of "medical improvement." See 42 U.S.C. (Supp. III) 423(f). In Section 2(d) of the 1984 Act (98 Stat. 1797-1798), Congress directed that the claims of class representatives and unnamed class members in certified class actions raising the "medical improvement" issue be remanded to the Secretary for reconsideration under the new standards, even if those individuals had not exhausted their administrative remedies as required by 42 U.S.C. 405(g). See *Bowen* v. *City of New York*, slip op. 18 n.14. In the instant case, the court of appeals concluded that all of the class members whose benefits had been terminated were covered by the special remand provisions of the 1984 Act. It therefore remanded the claims of those class members to the Secretary and dismissed the class action insofar as it involved the "medical improvement" cases (App. 9a-11a). That ruling was correct (see *Heckler* v. *Lopez*, 469 U.S. 1082 (1984), and *Heckler* v. *Kuehner*, 469 U.S. 977 (1984)) and is not at issue here.[6]

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[6] Although the court of appeals did not advert to the fact, the claim of respondent Polaski, the class representative, was covered by the special remand provisions of the 1984 Act. In fact, the district court separately remanded Polaski's case to the Secretary pursuant to those provisions on April 10, 1985 (App. 85a). Intervenor Blaschko's case also was subject to remand pursuant to Section 2 of the 1984 Act, and his individual case actually had been remanded by a different

b. The court of appeals next addressed the claims of those class members who had not previously been receiving disability benefits and who therefore were not covered by the special remand provisions in Section 2 of the 1984 Act. As to these class members (the new applicants), the instant case raised only the "pain" issue.

In Section 3 of the 1984 Act (98 Stat. 1799), Congress enacted new statutory standards for the evaluation of pain. See 42 U.S.C. (Supp. III) 423(d)(5)(A), reprinted at App. 104a-106a. As the court of appeals held, Section 3 was intended to ratify the Secretary's approach to the evaluation of pain by " 'put[ting] present regulatory policy into [the] statute' " and " 'more accurately reflect[ing] current policies' " (App. 18a-19a, quoting 130 Cong. Rec. H9836 (daily ed. Sept. 19, 1984) (remarks of Rep. Pickle), and H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 29 (1984)). The court of appeals therefore concluded that

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district judge even before the 1984 Act was passed. See note 3, *supra*.

Section 2(d)(4) of the 1984 Act provides that the decision by the Secretary on a specially remanded case "shall be regarded as a new decision on the individual's claim for benefits" and "shall be subject to further administrative review and to judicial review only in conformity with the time limits, exhaustion requirements, and other provisions of [42 U.S.C. 405] and regulations issued by the Secretary in conformity with such Section." 98 Stat. 1798. Polaski therefore cannot return to court unless she receives an adverse decision on remand and fully exhausts her administrative remedies. There accordingly is a question whether there has been a proper representative of the remaining class members—*i.e.*, the new-applicant members who challenged the Secretary's standards for the evaluation of pain—since April 10, 1985. There also is a serious question whether petitioner, who fully exhausted her administrative remedies before personally seeking judicial review, could in any event be a proper representative under Fed. R. Civ. P. 23(a)(3) of a class of claimants who knowingly declined to persue their administrative remedies and whose claims therefore are now barred by res judicata. See pages 15-16, *infra*.

Section 3 of the 1984 Act requires adjudicators to follow 20 C.F.R. 404.1529 and SSR 82-58, albeit in light of the agreement between the parties that was approved by the court on July 17, 1984 (App. 20a).

Thus, the court of appeals, unlike the district court, *approved* the Secretary's policies for the evaluation of pain. Moreover, Section 3 of the 1984 Act (in contrast to the special remand provisions in Section 2) does not provide for the readjudication of the claims of class members who made allegations of pain but who failed to exhaust their administrative remedies. Nevertheless, the court of appeals affirmed the district court's preliminary injunction insofar as it required the Secretary to provide for the reopening and readjudication of the claims of all of the new-applicant class members in this case, despite their failure to pursue their administrative remedies (App. 21a-28a).

4. The Secretary then filed a petition for a writ of certiorari seeking review of the court of appeals' reopening order. This Court granted the petition, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *Bowen* v. *City of New York*, No. 84-1923 (June 2, 1986). See *Bowen* v. *Polaski*, No. 85-55 (June 9, 1986). On remand, the Secretary contended that the logic of this Court's decision in *City of New York* required modification of the Eighth Circuit's decision so as to exclude from the class those claimants who failed to exhaust their administrative remedies.

In a brief order, the court of appeals declined to amend its prior judgment, giving three reasons for declining to do so (App. 1a-2a). First, it relied on the fact that the Secretary had stated, in suggesting that the Court hold the government's petition in No. 85-55 pending disposition of *City of New York*, that the exhaustion issue here was similar to that in *City of New York*, where the Court ultimately held that exhaustion was not required. See 85-55 Pet. 12, 16; Reply Br. 2. Second, the court of appeals

stated that its judgment "simply require[d] that the claims of the questioned class members be reopened at the administrative level" and "[did] not order that benefits be paid" (App. 2a). Third, the court expressed the view that "[u]nless these class members are permitted to reopen their claims with the Secretary, they may suffer irreparable injury" (*ibid.*). The Secretary's petition for rehearing en banc was denied (*id.* at 3a).

REASONS FOR GRANTING THE PETITION

The court of appeals has affirmed a sweeping injunction that requires the Secretary to provide for the reopening and readjudication of the claims of some 8000 class members, even though (i) Congress ratified and the court of appeals approved the Secretary's policies governing those claims, and (ii) the class members knowingly allowed the administrative decisions denying their claims to become final and binding by failing to seek timely administrative review. This unprecedented order is inconsistent with the Court's decision last Term in *Bowen* v. *City of New York* regarding exhaustion of administrative remedies as a prerequisite to judicial review under 42 U.S.C. 405(g).

In *City of New York,* the Court carved out a narrow exception to the exhaustion requirement in what the Court called the "unique circumstances" of that case. Slip op. 17. Those "unique circumstances" were found to involve a secret, systemwide, and unlawful policy that realistically could not have been challenged by individual claimants. *Ibid.* But despite the Court's remand of the instant case for further consideration in light of *City of New York,* the court below did not even mention these critical aspects of the Court's rationale. Here, in sharp contrast to *City of New York,* the court of appeals *sustained* the very policies that the plaintiff class challenged. Those policies were published, not secret, and therefore could not have been the cause of the class members' failure to pursue their ad-

ministrative remedies. And in further contrast to the class of mentally impaired claimants in *City of New York*, it would not have been unrealistic or futile for the class members here to pursue their administrative remedies in order to correct any misinterpretation of the Secretary's policies that might have occurred in particular decisions at the early stages of the administrative review process.

If a court may excuse claimants from the consequences of their deliberate choices to forgo further review in circumstances such as these, then there is effectively nothing left of the exhaustion requirement that Congress enacted in 42 U.S.C. 405(g). Numerous other class actions raising similar exhaustion issues are pending in the lower courts, and such suits will proliferate if the courts persist in what we believe to be a fundamental misunderstanding of this Court's exhaustion ruling in *City of New York*. Review by this Court is thus warranted at this time.

1. This Court's ruling in *City of New York* does not support the court of appeals' almost casual reaffirmance of the district court's injunction, which would require the reopening of the claims of some 8000 class members. The Secretary's decisions denying each member's claim are now final and binding by operation of 42 U.S.C. 405(g), implementing regulations, and this Court's own prior decisions addressing the jurisdictional prerequisites to suit under 42 U.S.C. 405(g). See *Heckler* v. *Ringer*, 466 U.S. 602 (1984); *Califano* v. *Sanders*, 430 U.S. 99, 108-109 (1977); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975); *Mathews* v. *Eldridge*, *supra*. The Court in *City of New York* did not purport to sweep those prerequisites aside. See slip op. 3-4, 13-14. To the contrary, it stated that "exhaustion is the rule in the vast majority of cases" and that exhaustion was excused in *City of New York* only because of its "unique circumstances" (slip op. 18, 17). Contrary to the court of

appeals' holding on remand, this class action is clearly controlled by the principles that govern "the vast majority of cases" (*ibid.*).

a. The general rule that a person seeking benefits under the Social Security Act must pursue his administrative remedies before filing suit is not merely a "judicially developed doctrine of exhaustion" (*Salfi,* 422 U.S. at 766). That requirement is mandated by the language of 42 U.S.C. 405(g) itself, which provides that an individual may obtain judicial review only "after [a] *final decision* of the Secretary made after a hearing to which he was a party" (emphasis added). Because the existence of a "final decision" is a condition on Congress's waiver of sovereign immunity (compare *City of New York,* slip op. 10-11), the Court has held that a "final decision" is "central to the requisite grant of subject-matter jurisdiction" and therefore is a "statutorily specified jurisdictional prerequisite" to suit (*Salfi,* 422 U.S. at 764, 766; accord, *Ringer,* 466 U.S. at 617).

Congress has left to the Secretary to specify by regulation what constitutes the "final decision" that terminates administrative proceedings on a particular claim and triggers the right of judicial review. *Salfi,* 422 U.S. at 766 & n.9. "Pursuant to [his] rulemaking authority," the Secretary "has provided that a 'final decision' is rendered on a * * * claim only after the individual claimant has pressed his claim through all designated levels of administrative review" (*Ringer,* 466 U.S. at 606; see also *Salfi,* 422 U.S. at 765). See pages 2-3, *supra.* This requirement has been embodied in the regulations governing review of social security claims for almost 50 years. See 5 Fed. Reg. 4171-4174 (1940), adopting 20 C.F.R. 403.706(c), 403.708(g), 403.709(*l*), 403.710(e); S. Doc. 10, 77th Cong., 1st Sess. Pt. 3, at 38-39, 51-53 (1941). The Court held in *Salfi* that the prerequisite of a final decision

by the Appeals Council "may not be dispensed with merely by a judicial conclusion of futility" (422 U.S. at 766; see also *Ringer,* 466 U.S. at 618-619).

b. When Congress enacted the disability program in 1954 and 1956 and the SSI program in 1972,[7] it specified that a disability claimant under either program may obtain judicial review of the Secretary's "final" decision rendered after a hearing, in the same manner "as is provided in section 405(g)" (see 42 U.S.C. (& Supp. III) 421(d), 1383(c)(3)). In view of the long-established rule under Section 405(g) that a claimant must obtain a decision by the Appeals Council before seeking judicial review, Congress's express incorporation into the disability programs of the finality requirement and other procedures under Section 405(g) constitutes a clear directive that the same exhaustion rule is to be applied under those programs. See *Lindahl* v. *OPM,* 470 U.S. 768, 782 & n.15 (1985); *Lorillard* v. *Pons,* 434 U.S. 575, 580-581 (1978).

Congress's general adherence to the exhaustion requirement in 42 U.S.C. 405(g) was confirmed by the Social Security Disability Benefits Reform Act of 1984. The Senate Report, in connection with its discussion of the "medical improvement" issue that ultimately was resolved by Section 2 of the 1984 Act (see page 8, *supra*), explains the jurisdictional principles that govern judicial review under the disability programs. See S. Rep. 98-466, 98th Cong., 2d Sess. 13-17 (1984). The Senate Report reflects a clear understanding that the exhaustion rules prescribed by governing regulations and *Salfi* and *Ringer* are fully applicable to the disability programs and that an Appeals Council decision is a prerequisite to judicial review. S. Rep. 98-466, *supra,* at 15. Congress did not disturb

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[7] Social Security Amendments of 1954, Pub. L. No. 761, § 106, 68 Stat. 1079; Social Security Amendments of 1956, Pub. L. No. 880, § 103, 70 Stat. 815; Social Security Amendments of 1972, Tit. III, Pub. L. No. 92-603, 86 Stat. 1465 *et seq.*

the general operation of those settled principles in 1984, although it did carve out a limited exception for "medical improvement" cases. See page 20, *infra*. Against this background, "it would be an unwarranted judicial intrusion into this pervasively regulated area" (*Heckler* v. *Day*, 467 U.S. 104, 119 (1984)) for a court, in the absence of the most compelling reasons, to excuse a claimant from his procedural default in failing to pursue his administrative remedies as a precondition to judicial review.[8]

c. The court of appeals' decision in this case wholly fails to respect these governing principles. The named class representative, respondent Polaski, did exhaust her administrative remedies and, hence, the courts below properly took jurisdiction of her individual claim. But those courts had no authority under Section 405(g) to grant relief to the thousands of unnamed class members who, unlike Polaski, did not exhaust their administrative remedies by obtaining decisions from the Appeals Council. This Court repeatedly has held that a class may be certified in an action under 42 U.S.C. 405(g) only if *each* of the class members individually satisfies the requirements of that

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[8] This conclusion is reinforced by the fact that where Congress *has* concluded that disability claimants might experience undue financial hardship while they pursue their administrative remedies, it nevertheless has declined to dispense with the exhaustion requirement. Instead, Congress has enacted provisions permitting certain claimants—those who previously had been receiving benefits and might have become dependent upon them, but who were found by the state agency no longer to be disabled—to continue to receive benefits through the ALJ hearing stage. See 42 U.S.C. (Supp. III) 423(g). In all other circumstances, however, Congress has continued to regard a retroactive award of benefits at a later stage of the administrative and judicial review process to be a fully adequate remedy for an erroneous denial of benefits at a preliminary stage of that process. See *Mathews* v. *Eldridge*, 424 U.S. at 339-340.

Section, including the "final decision" requirement. *Califano* v. *Yamasaki,* 442 U.S. 682, 701, 704 (1979); *Mathews* v. *Diaz,* 426 U.S. 67, 71 n.3 (1976); *Salfi,* 422 U.S. at 764. Indeed, the fact that Polaski exhausted her administrative remedies suggests that similarly-situated claimants could have done the same if they truly wished to challenge the denial of their claims. Instead, those unnamed class members elected to forgo the opportunity to seek further review after they were expressly notified of their right to do so. As a result, not only did they fail to obtain the "final decision" of the Secretary that is a precondition to judicial review; the state-agency or ALJ decisions denying their claims also became binding against them on the merits and now have res judicata effect. See pages 2-3, *supra.*

2. a. The court of appeals, without referring to the foregoing considerations, believed that its order requiring the reopening of the closed cases of the unnamed class members could be justified on the authority of *City of New York.* The court of appeals was mistaken. This Court rested its holding in *City of New York* on the "unique circumstances" of that case (slip op. 17). Specifically, the Court relied on the district court's finding that there had been a "systemwide, unrevealed policy that was inconsistent in critically important ways with established regulations" (*ibid.*). And the Court also observed that "exhaustion would have been futile" in view of the fact that the secret policy "was being adhered to by state agencies due to pressure from SSA" (*ibid.*).

None of these factors upon which the Court relied in *City of New York* is present here. The policy challenged by respondents was not "unrevealed" or secret; it was embodied in a published regulation and Social Security Ruling. There accordingly can be no suggestion here, as there was in *City of New York,* that "secretive conduct" by the government might have lulled claimants into inactivity,

inducing them to abandon attempts to seek administrative review of "a policy they could not know existed" (slip op. 12-13, 14). In further contrast to *City of New York,* the court below held that the policies challenged here were *lawful* and had been ratified by Congress (App. 18a-19a). The court of appeals had no authority to order circuit-wide reopening of claims in the absence of any finding of an unlawful circuit-wide policy.

The agreement between the parties that was approved by the court of appeals in July 1984 did state that "some adjudicators" had misinterpreted the Secretary's policies regarding the evaluation of pain that were embodied in SSR 82-58. However, this Court made unambiguously clear in *City of New York* that such allegations do not permit a court to dispense with the exhaustion requirement even in an individual case (slip op. 16-17):

> This case is materially distinguishable from one in which a claimant sues in district court, alleging mere deviation from the applicable regulations in his particular administrative proceeding. In the normal course, such individual errors are fully correctable upon subsequent administrative review since the claimant on appeal will alert the agency to the alleged deviation. Because of the agency's expertise in administering its own regulations, the agency ordinarily should be given the opportunity to review application of those regulations to a particular factual context. Thus, our holding today does not suggest that exhaustion is to be excused whenever a claimant alleges an irregularity in the agency proceedings.

A fortiori, in a class action, allegations that errors may have occured in *some* individual cases do not permit a court to dispense with the exhaustion requirement for *all* class members.[9]

[9] Indeed, once the court of appeals concluded that the pain regulation and the SSR that the plaintiffs challenged were facially valid,

b. The court of appeals also sought to support its result by theorizing that class members "may suffer irreparable injury" unless the Secretary reopened their claims (App. 2a). But this rationale likewise draws no support from *City of New York*. In excusing exhaustion there, the Court relied upon the district court's finding that the mentally impaired class members "not only were denied the benefits they were seeking, but '[t]he ordeal of having to go through the administrative appeal process may trigger a severe medical setback' " (slip op. 15 (citation omitted)). Compare *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242, 244 (1980). In this case, by contrast, neither court below found that pursuit of the administrative review process would *itself* cause harm to the instant plaintiffs. Rather, the "irreparable injury" cited by the court of appeals (App. 23a-24a) flowed from the facts that those individuals voluntarily elected not to pursue their claims and that their claims (unless reopened) were now barred by res judicata. But if the adverse financial consequences flowing from the denial of one's claim—consequences that any disability claimant might allege—were sufficient to dispense with exhaustion, the "final decision" requirement in 42 U.S.C. 405(g) would be nugatory in disability cases. Congress clearly did not intend that result when it incorporated 42 U.S.C. 405(g) and its well-established exhaustion requirement into the disability and SSI programs.

For similar reasons, the court of appeals' passing observation that it was merely requiring that claims be reopened, not that benefits be paid (App. 2a), is not in itself a basis for dispensing with the exhaustion requirement. If it were, no decision denying benefits would ever become

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each individual class member's entitlement to benefits necessarily turned on the facts of his own impairment. As a result, there was no longer a question of law or fact common to the members of the class, and the case should not have been permitted to proceed as a class action. See Fed. R. Civ. P. 23(a)(2).

final. This Court in *City of New York* did observe that the legal arguments presented there were "collateral" to any claim for benefits in the sense that the class members were not actually seeking an award of benefits, but were seeking to challenge a policy that improperly had tainted the administrative decision-making process. Slip op. 15. In this case, by contrast, the court of appeals has held that the Secretary's policies governing the evaluation of pain were both published and lawful. The instant plaintiffs thus advance no claim that is collateral in *any* sense to their claims for benefits; they simply wish to argue that a particular state-agency decision-maker or ALJ may have erred in deciding their particular cases. Moreover, in *City of New York,* the Court did not rest its exhaustion ruling on the mere fact that the claimants were not actually requesting an award of benefits. See slip op. 16-17.

In sum, the court of appeals was obligated on remand for reconsideration in light of *City of New York* to define the "unique circumstances" that distinguished the instant case from the "vast majority of cases" in which exhaustion would be required. See slip op. 18. The court of appeals made no effort to do so. It decision on remand is thus inconsistent with the reasoning and result of this Court's decision.[10]

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[10] The court of appeals observed on remand that the Secretary had stated on petition for certiorari on the prior occasion that "the exhaustion issue in this case was essentially identical to that presented to the Supreme Court in [*City of New York*]" (App. 2a). However, an explanation that two cases present some of the same *general* issue of law is standard in requesting the Court to hold a petition in one case for the decision in the other. Moreover, in a passage the court below ignored, the prior certiorari petition in this case (85-55 Pet. 14) argued that the Eighth Circuit decision was more "egregious" than that of the Second Circuit in *City of New York* because the Eighth Circuit did not even find any unlawful policy. In any event, this Court did not simply deny the Secretary's prior certiorari petition in this case, as it presumably would have done if it believed that this case was controlled by its decision in *City of New York*; instead, the Court vacated and remanded for further consideration in light of *City of New York*.

3. If there could be any doubt about the impropriety of the reopening relief ordered by the court of appeals, it is dispelled by the Social Security Disability Benefits Reform Act of 1984. In order to resolve the controversy over the "medical improvement" issue, Congress directed in Section 2(d) of the Act that numerous claims raising that issue be remanded to the Secretary for readjudication under the new statutory standards, even if the individuals involved had not exhausted their administrative remedies. See H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 27 (1984); S. Rep. 98-466, *supra,* at 14. The claims of the terminated beneficiaries in this case—including that of the class representative—were duly remanded under this provision. See page 8, *supra*. But Congress did not enact such special reopening relief for any other category of claimants, such as the new-applicant class members here who made allegations of pain. Indeed, Congress could not possibly have envisioned reopening relief for class members making such allegations, since Congress in 1984 explicitly *ratified* the Secretary's policies in that respect.

It is in fact Congress's ratification of the Secretary's policies regarding pain that distinguishes the instant case most pointedly from *City of New York*. The *City of New York* case involved the Secretary's policies for the evaluation of mental impairments, and Congress in 1984 strongly criticized those policies. The House Report noted that the courts had raised serious questions about the Secretary's mental impairment standards and that "in many cases individuals ha[d] been improperly denied benefits" (H.R. Rep. 98-618, 98th Cong., 2d Sess. 15 (1984)). Accordingly, in Section 5 of the 1984 Act (98 Stat. 1801-1802), Congress directed the Secretary to develop new standards for the evaluation of mental impairments, imposed a temporary moratorium on the continuing review of such claimants, and permitted mentally impaired individuals whose claims

were denied to reapply for benefits under the new standards. See *City of New York,* slip op. 18 n.14; H.R. Rep. 98-618, *supra,* at 15-16; H.R. Conf. Rep. 98-1039, *supra,* at 30-31.

By contrast, as the court of appeals held (App. 19a-20a), Congress in the 1984 Act explicitly approved the Secretary's policies regarding the evaluation of pain and signaled its intent to terminate litigation then pending on the subject. The Senate Report stated that "[i]t has come to the attention of the Committee that there are a number of outstanding court cases which are challenging the current policies of the Administration concerning the weight to be attached to the claimant's subjective allegations concerning pain" (S. Rep. 98-466, 98th Cong., 2d Sess. 23-24 (1984)). The instant litigation and the *Hyatt* litigation in the Fourth Circuit (see pages 22-23, *infra*)—two major class actions involving thousands of claimants—no doubt were the principal such cases that the Committee had in mind.[11] The Senate Report, however, expressed strong disapproval of these cases (*ibid.*), stating that the Secretary's regulations concerning pain

> should receive appropriate deference by the courts. However, if courts ignore the Secretary's regulatory authority and the expressed Congressional concerns for careful administration, national uniformity, and verifiable evidence, the Committee has little choice but to draw the statute as narrowly as possible. For this reason, the Committee has included in the statutory rules for determining disability a specific rule for evaluating subjective allegations of pain. It is the clear intention of the Committee that this rule should be seen as a codification of the regulations and policies currently followed by the Administration.

Other aspects of the legislative history reiterate this intention to prevent judicial intrusion into the Secretary's

[11] See S. Rep. 98-466, *supra,* at 45 (additional views of Senator Long) (strongly criticizing the district court's ruling "[i]n a recent case, *Polaski* v. *Heckler*").

evaluation of pain.[12] The court of appeals' order that the Secretary readjudicate claims that were processed under the very policies that Congress endorsed flies in the face of this congressional judgment.

4. The practical significance of the exhaustion issue presented in this case is illustrated by the dimensions of the litigation on the subject in the lower courts. In addition to affecting some 8000 claims in this case alone, the Eighth Circuit's ruling presumably also will control the exhaustion issue in a similar class action in Missouri involving an estimated 9500 claims. *Boyd* v. *Heckler,* Civil No. 83-0352-CV-W-1 (W.D. Mo.). In another class action challenging the Secretary's approach to the evaluation of

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[12] See 130 Cong. Rec. H9834 (daily ed. Sept. 19, 1984) (remarks of Rep. Rostenkowski):

> The final bill also contains more explicit language concerning pain, which we hope will resolve pending litigation until the Social Security Subcommittee reviews a mandated study and report.

Id. at S11458 (remarks of Sen. Long):

> Instead of granting deference to the Secretary's inherent regulatory authority to determine the criteria for establishing disability, a number of courts have chosen to substitute their policy judgment that subjective allegations must be considered even in the absence of objective evidence of the type required by regulation. Ultimately, this would mean that eligibility would depend upon the subjective credibility judgment made by each individual adjudicator of claims. This is not much different from turning over the trust funds to the judges and letting them hand out the funds on a case-by-case basis as they see fit.

H.R. Rep. 98-618, *supra,* at 14:

> The committee is * * * reluctant at this time to allow determinations of disability to be based on such subjective criteria. There is plainly a critical need for a clear legislative policy, to be applied in all cases on a nationwide basis; it is not appropriate for the Federal courts to establish policy on such an issue simply because the statute is insufficiently specific.

See also H.R. Conf. Rep. 98-1039, *supra,* at 28-29.

pain, the Fourth Circuit has required the reopening of the claims of an estimated 80,000 class members who likewise abandoned their claims at the preliminary stages of the administrative review process. *Hyatt* v. *Heckler,* 807 F.2d 376 (4th Cir. 1986). We have been informed by the Department of Health and Human Services that there are about 30 other class actions currently pending under the disability programs that raise similar exhaustion issues. In one of those cases, a district court in New York has rendered a decision that, when implemented, will require the reopening of an estimated 80,000 claims. *New York* v. *Bowen,* No. 83 Civ. 5903 (RLC) (S.D.N.Y. Jan. 21, 1987).

We believe that these decisions manifest a serious misapprehension of this Court's holding in *City of New York*. The Court there recognized an extraordinary exception to the exhaustion requirement, but the lower courts in the wake of that decision have begun to expand that exception to a point where it swallows the rule. Although there is as yet no conflict among the circuits on this issue, we think it appropriate for the Court to act now to stem a trend of decisions that threaten to undermine administrative finality on a truly staggering scale. The instant case, which the Court previously vacated for reconsideration in light of *City of New York*, is a suitable vehicle for addressing this important question.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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APRIL 1987

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No.

Supreme Court, U.S.
FILED
APR 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

LORRAINE POLASKI, ET AL.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-5085

LORRAINE POLASKI, ET AL., APPELLEES,

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT.

Appeal from the United States District Court
for the District of Minnesota

Submitted: July 21, 1986

Filed: October 30, 1986

Before HEANEY, JOHN R. GIBSON and FAGG, Circuit Judges.

HEANEY, Circuit Judge.

This matter comes before this Court on remand from the Supreme Court of the United States. We were directed to reconsider our decision in *Polaski v. Heckler*, 751 F.2d 943 (8th Cir. 1985) in light of *Bowen v. City of New York*, 476 U.S. , 54 U.S.L.W. 4536 (June 3, 1986). Upon our request, the parties filed supplemental briefs.

The Secretary takes the position that our opinion must be amended to exclude from the class those people who filed claims with the Secretary within a stated time

period but failed to exhaust their administrative remedies by appealing the Secretary's denial of benefits. The appellees argue that no amendment is required.

After a careful review of *Bowen*, we agree that no amendment is required for the following reasons:

1. On petition for certiorari the Secretary stated that the exhaustion issue in this case was essentially identical to that presented to the Supreme Court in *Bowen*. The Supreme Court in *Bowen* held that exhaustion was not required.

2. Here, as in *Bowen*, we simply require that the claims of the questioned class members be reopened at the administrative level. We do not order that benefits be paid. Unless these class members are permitted to reopen their claims with the Secretary, they may suffer irreparable injury.

This Court's stay of July 10, 1985, is lifted and the Clerk is directed to issue the mandate forthwith.

A true copy.

Attest:

CLERK: U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-5085-MN

LORRAINE POLASKI, ET AL., APPELLEES,

v.

MARGARET M. HECKLER, ETC., APPELLANT.

Appeal from the United States District Court
for the District of Minnesota

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

January 8, 1987

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-5085

LORRAINE POLASKI, ET AL., APPELLEES

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

Appeal from the United States District Court for the District of Minnesota

---

Submitted: June 12, 1984

Filed: December 31, 1984

Before HEANEY, JOHN R. GIBSON and FAGG, Circuit Judges.

HEANEY, CIRCUIT JUDGE.

The Secretary of Health and Human Services appeals from a district court order granting a prelimi-

nary injunction to a class of plaintiffs seeking social security disability benefits. For the reasons set forth below, we remand for further proceedings.

I. BACKGROUND.

For several months a dispute has raged in this and other Circuits on the question of whether the Secretary of Health and Human Services (Secretary) has been properly construing the Social Security Act, particularly with respect to persons who claim to be disabled because of pain and with respect to persons whose disability benefits have been terminated. On January 20, 1984, Lorraine Polaski filed a complaint in federal district court for the District of Minnesota, seeking review of the termination of her social security disability benefits by the Secretary. She later amended her complaint to pursue the case as a class action on behalf of similarly situated disabled persons within the Eighth Circuit. The amended complaint alleges: first, that the Secretary is not following Eighth Circuit law in that she is terminating disability benefits absent evidence demonstrating either that the claimant's condition has materially improved or that the original decision granting benefits was erroneous; and second, that the Secretary is not following Eighth Circuit law in that she is requiring that objective medical evidence fully corroborate a disability claimant's allegations of pain and other subjective complaints.

On April 27, 1984, the district court issued a preliminary injunction and a class certification order. It determined that the Secretary was nonacquiescing in Eighth Circuit decisions with respect to the proper standard for evaluating pain and other subjective complaints, and with respect to the proper standard

for terminating disability benefits. The court enjoined the Secretary from denying or terminating disability benefits unless she followed this Court's decisions regarding these standards. It also provided for reconsideration of the claims of persons within the class under the designated standards.

On May 1, 1984, the Secretary sought an emergency stay of the preliminary injunction pending appeal to our Court. The district court denied that motion the next day. The Secretary filed a notice of appeal on May 15, 1984. On May 25, 1984, this Court granted a temporary stay pending appeal. We heard oral argument on June 12, 1984.

In her brief and at oral argument, the Secretary asserted that she had been applying Eighth Circuit cases concerning the standard for evaluating allegations of pain and other subjective complaints. The appellants took a contrary view, but in light of the Secretary's assertion, we deferred a decision to give the parties a chance to reach an agreement on the issue.

On July 11, 1984, the Justice Department notified this Court that the parties reached a settlement, agreeing to the relevant standard for evaluating pain cases.

On July 17, 1984, this Court entered an order in which we stated that the settlement agreement set forth a correct statement of the law concerning pain cases, to be followed in all administrative and judicial proceedings within the Eighth Circuit. We required the Secretary to transmit the agreed-upon language to adjudicators within the Eighth Circuit responsible for determining disability, including personnel in state and district offices, and personnel within the Social Security Administration, administrative law

judges (ALJs), and the Appeals Council. On July 18, the Secretary disseminated the approved language to all adjudicators.

Meanwhile, on June 27, 1984, this Court held in *Rush v. Secretary of Health and Human Services*, 738 F.2d 909 (8th Cir. 1984), that "in a disability-termination proceeding, there is a presumption that a claimant who has previously been determined to be disabled remains disabled." *Id.* at 915-16 (footnote omitted). We also held that the Secretary must bear the initial burden to come forward with evidence showing that there is a legitimate reason to re-evaluate the claimant's right to receive benefits. We explained that the Secretary could meet this burden

> by showing that there was clear and specific error in the prior determination or by producing new evidence that the claimant's medical condition has improved, that the claimant has benefited from medical or vocational therapy or technology, or that the claimant's condition is not so disabling as originally supposed.

Id. at 916.

On September 13, 1984, this Court entered an order directing the Secretary of Health and Human Services to inform the Clerk of the United States Court of Appeals for the Eighth Circuit on or before September 25, 1984, whether she intended to non-acquiesce in the Court's decision in *Rush*.

On September 19, 1984, Congress passed the Social Security Disability Benefits Reform Act of 1984 (1984 Act), Pub. L. No. 98-460, 98 Stat. 1794 (1984). The President signed the Act on October 9, 1984, and it became effective on that date. Among other things, the Act sets forth the standard for reviewing disability benefits terminations, and the

standard for evaluating pain and other subjective complaints. It also establishes the procedures to be followed in pending and future cases relating to medical improvement and pain.

II. TERMINATION CASES WHERE MEDICAL IMPROVEMENT IS ALLEGED.

The 1984 Act details the procedure to be followed concerning persons whose benefits have been terminated by the Secretary. It provides in pertinent part that the Secretary may terminate the benefits of persons who have previously been found disabled only if there is substantial evidence which demonstrates that:

> (A) there has been any medical improvement in the individual's impairment or combination of impairments (other than medical improvement which is not related to the individual's ability to work), and
>
> (B) * * * the individual is now able to engage in substantial gainful activity.[1]

Id. § 2(a).

This determination is to be made

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[1] The 1984 Act also provides several other grounds for termination: (1) where the claimant has benefited from advances in medical or vocational therapy or technology; (2) where the claimant's impairment is shown to be not as disabling as orginally determined, based on new or improved diagnostic techniques; or (3) where the prior determination of disability is shown to be in error. In each case there must also be substantial evidence that the individual is now able to engage in substantial gainful activity. Social Security Benefits Reform Act of 1984, Pub. L. No. 98-460, § 2(a), 98 Stat. 1794 (1984).

> on the basis of the weight of the evidence and on a neutral basis with regard to the individual's condition, without any initial inference as to the presence or absence of disability being drawn from the fact that the individual has previously been determined to be disabled.

Id.

This language makes clear that the portion of our *Rush* decision that recognized a presumption of continuing disability and required the Secretary to bear the initial burden of producing evidence indicating a legitimate reason to reevaluate the claimant's disability no longer stands.

The Act provides that the court shall remand to the Secretary the cases of persons whose benefits have been terminated and who were unnamed members of a class action relating to medical improvement pending as of September 19, 1984. The Secretary is to notify these persons that they may request a review of their cases under the 1984 Act within 120 days of receiving this notice. The claimant may also request interim benefits pending the initial redetermination. The Secretary's decision as to each claimant is subject to further administrative and judicial review, if the claimant requests this review in a timely manner. *Id.* § 2(d)(3). The 1984 specifies that the decision by the Secretary is to be

> regarded as a new decision on the individual's claim for benefits, which supersedes the final decision of the Secretary. The new decision shall be subject to further administrative review and to judicial review only in conformity with the time limits, exhaustion requirements, and other provisions of section 205 of the Social Security

> Act and regulations issued by the Secretary in conformity with such section.

Id. § 2(d)(4).

Finally, the 1984 Act limits class action litigation over the medical improvement standard by providing that:

> No class in a class action relating to medical improvement may be certified after September 19, 1984, if the class action seeks judicial review of a decision terminating entitlement (or a period of disability) made by the Secretary * * * prior to September 19, 1984.

Id. § 2(d)(5).

In light of the action taken by Congress, there are only two questions remaining in this litigation concerning claimants who allege that their disability benefits have been erroneously terminated because of the improper application of the medical improvement standard: 1) should the pending class action be dismissed upon remand to the Secretary, and 2) if not, what portions of the district court's order should be implemented in light of the 1984 Act?

The Secretary maintains that, after an individual case or the case of an unnamed class member is remanded to the Secretary, there is no further role for any court, and the 1984 Act thus requires that the case be dismissed. The plaintiffs contend that the 1984 Act does not require dismissal of the case and that the district court should continue to supervise the case after remand to the Secretary.

The 1984 Act requires that all claims including those of named and unnamed class members be initially resolved by the Secretary. *Id.* § 2(d). The conference agreement states that the 1984 Act "pro-

vides that the existing certified classes will be covered by the new standard in order to resolve the existing controversy over the medical improvement issue in the courts." 130 Cong. Rec. H9828 (daily ed. Sept. 19, 1984). In accordance with this objective, we dismiss the class action concerning the medical improvement cases. We note, however, that the disability benefits of more than 400,000 persons were terminated by the Secretary. Many of those terminated have sought review of their individual claims in this and other Circuits. At least two class actions including the instant one have been commenced in this Circuit. It is now conceded that the benefits of many persons were improperly terminated. In light of this history, the Secretary has a responsibility to those who have sought the protection of this Court to insure that the claims of those who were terminated and who seek review and reinstatement of benefits are handled promptly and in accordance with the letter and the spirit of the 1984 Act.

The plaintiffs contend that, where the statute and the preliminary injunction conflict with respect to the nature and the timing of relief, the preliminary injunction should prevail. First, § 2(d)(2) of the 1984 Act provides that the claims of class members with individual appeals pending in court be automatically remanded. The district court allowed class members to choose either to remand to the Secretary, or have their cases adjudicated by the court with jurisdiction over their appeals. The plaintiffs argue that class members should, in the interest of judicial economy, be allowed the latter option. They also argue that, because many claimants have raised issues in addition to medical improvement (including the pain issue) which may be dispositive, we should

permit the courts to resolve these cases without remand. They cite the delay in the administrative process as requiring this result. We recognize that there is merit to these contentions, but Congress has spoken and we cannot disregard its mandate to remand these cases to the Secretary. Second, even though the statute provides that class members who are not pursuing administrative or judicial appeals must affirmatively request readjudication of their claims after receiving notice, the plaintiffs argue that these claims should be readjudicated automatically as provided by the preliminary injunction. Again, notwithstanding the plaintiffs' analysis of the relative burdens and benefits of automatic readjudication, this balancing decision has been conducted by Congress, and it must be respected.

At least two practical aspects of the district court's preliminary injunction remain which have not been addressed by Congress. Specifically, while the 1984 Act does provide that the Secretary must prescribe regulations implementing the Act within six months, the Act is silent as to the timing and the form of notice to be given to class members concerning their right to readjudication and reinstatement of benefits. The timetable for notifying class members was certainly a concern of the Congress. The conference report states that:

> The conferees recognize that there will be considerable administrative difficulty in identifying and notifying individuals who are eligible to have their cases redetermined as a result [of] their being unnamed [sic] members of class actions certified prior to September 19, 1984. Notwithstanding the administrative difficulty of this task, the conferees expect the Secretary of Health

> and Human Services to act expeditiously in notifying these individuals of the provisions of this act which are applicable to them.

130 Cong. Rec. H9828 (daily ed. Sept. 19, 1984).

In light of this conference report and in light of the fact that the Secretary will have to notify not only the class members of this class action, but persons similarly situated throughout the United States, we cannot mandate that the specific time periods in the district court's order be followed. Again, we emphasize, however, that significant delays have already occurred and that the Secretary should act promptly.

The Secretary apparently does not object to the form or content of the notices. The Act leaves it to the Secretary to notify class members about their right to readjudication of their claims; while the notice provisions approved by the district court are not mandatory, the Secretary may wish to use them to the extent they are consistent with the Act.

III. PAIN CASES.

The July 11, 1984, stipulation signed by the Secretary and the plaintiffs with respect to evaluation of pain read as follows:

> A claimant has the burden of proving that the disability results from a medically determinable physical or mental impairment. Symptoms such as pain, shortness of breath, weakness, or nervousness are the individual's own perceptions of the effects of a physical or mental impairment(s). Because of their subjective characteristics and the absence of any reliable techniques for measurement, symptoms (especially pain)

are difficult to prove, disprove, or quantify. *As a result of this difficulty, some adjudicators have misinterpreted the Secretary's policies as enunciated in SSR-82-58.* [Emphasis added.]

In particular, some adjudicators may have misinterpreted Example No. 2 in SSR-82-58 to allow allegations of pain to be disregarded solely because the allegations are not fully corroborated by objective medical findings typically associated with pain. The example should not be construed to be inconsistent with the text of SSR-82-58 which states in part:

> The effects of symptoms must be considered in terms of any additional physical or mental restrictions they may impose beyond those clearly demonstrated by the objective physical manifestations of disorders. Symptoms can sometimes suggest a greater severity of impairment than is demonstrated by objective and medical findings alone.

While the claimant has the burden of proving that the disability results from a medically determinable physical or mental impairment, direct medical evidence of the cause and effect relationship between the impairment and the degree of claimant's subjective complaints need not be produced. The adjudicator may not disregard a claimant's subjective complaints solely because the objective medical evidence does not fully support them.

The absence of an objective medical basis which supports the degree of severity of subjective complaints alleged is just one factor to be considered in evaluating the credibility of the

testimony and complaints. The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:

1. the claimant's daily activities;

2. the duration, frequency and intensity of the pain;

3. precipitating and aggravating factors;

4. dosage, effectiveness and side effects of medication;

5. functional restrictions.

The adjudicator is not free to accept or reject the claimant's subjective complaints *solely* on the basis of personal observations. Subjective complaints may be discounted if there are inconsistencies in the evidence as a whole. [Emphasis in original.]

Polaski v. Heckler, 739 F.2d 1320, 1321-22 (8th Cir. 1984).

On July 17, 1984, this Court issued an order approving the language as a correct statement of the law under the Social Security Act and of the case law in the Eighth Circuit. On July 18, 1984, the Secretary disseminated the approved language to all adjudicators—state district offices, state DDS offices, and ALJs in the Eighth Circuit. It disseminated the same information to the Appeals Council.

Thereafter, this Court permitted the parties to file supplemental briefs to explain how the agreement on the pain standard, as approved by this Court,

affected this litigation. The government's brief stated:

> The approved language is simply a clarification of SSR 82-58, which is the Secretary's instructional ruling on the evaluation of pain and other subjective complaints. This point is made clear by the specific reference in the approved language to SSR 82-58 *and the fact that errors in cases involving pain may have been the result of misinterpretations of the SSR and specifically Example No. 2 in the SSR.* * * * ("[S]ome adjudicators have misinterpreted the Secretary's policies enunciated in SSR-82-58"; and "some adjudicators may have misinterpreted Example No. 2 in SSR-82-58").
>
> That the approved language is a clarification of SSR 82-58 is further reinforced by the fact that the Secretary's regulations and SSR 82-58 require that pain and other subjective complaints be evaluated according to the following factors:
>
> 1. the claimant's daily activities;
>
> 2. the duration, frequency and intensity of the pain;
>
> 3. precipitating and aggravating factors;
>
> 4. dosage, effectiveness and side effects of medication;
>
> 5. functional restrictions.

See SSR 82-58, Addendum D to Opening Brief at 3. The approved language identifies the same factors and similarly requires their considera-

tion in the evaluation of subjective complaints of pain. * * *

In sum, the approved language is merely a restatement of the standard which the Secretary has been following all along. [Emphasis added, citations omitted.]

On September 19, 1984, Congess passed the Social Security Disability Benefits Reform Act of 1984.[2] That Act amended the existing law with respect to evaluation of pain. It provides:

EVALUATION OF PAIN

SEC. 3. (a)(1)[.] Section 223(d)(5) of the Social Security Act is amended by inserting after the first sentence the following new sentences: "An individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished under this paragraph (including statements of the individual or his physician as to the intensity and persistence of such pain or other symptoms which may reasonably

[2] The existing statute stated only that: "An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require." 42 U.S.C. § 423(d)(5).

be accepted as consistent with the medical signs and findings), would lead to a conclusion that the individual is under a disability. Objective medical evidence of pain or other symptoms established by medically acceptable clinical or laboratory techniques (for example, deteriorating nerve or muscle tissue) must be considered in reaching a conclusion as to whether the individual is under a disability."

(2) Section 1614(a)(3)(H) of such Act (as added by section 8 of this Act) is amended by striking out "section 221(h)" and inserting in lieu thereof "sections 221(h) and 223(d)(5)".

(3) The amendments made by paragraphs (1) and (2) shall apply to determinations made prior to Jauary 1, 1987.

Id. § 3(a).

The conference report summarized Congress's understanding of present law with respect to evaluation of pain as follows:

There is no statutory provision concerning the evaluation of pain (or the use of subjective allegations of pain) in determining eligibility for disability benefits. The definition of disability requres that the person be unable to work by reason of a "medically determinable impairment"—one which results from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

By regulation, subjective allegations of symptoms of impairments, such as pain, cannot alone be evidence of disability. There must be medical signs or other findings which show there is a medical condition that could be reasonably ex-

> pected to produce those symptoms and that is severe enough to be disabling.

130 Cong. Rec. H9828-29 (daily ed. Sept. 19, 1984).

The conference report then stated:

> The statutory language providing for an interim standard for evaluation of pain is amended to more accurately reflect current policies.

Id. at H9829.

The Chairman of the Social Security Subcommittee, Congressman J. J. Pickle, commenting on the statutory provisions concerning pain, stated:

> With reference to pain, the conference agreement puts present regulatory policy into statute until January 1, 1987, and mandates that in the meantime, a study be conducted so that we might better deal with this very difficult issue. I know the many Members in both bodies are concerned about the fairness of our present policies and I would expect that as we continue to benefit from the progress of medical science, we will improve our laws in this regard.

Id. at H9836.

No other House member commented on the statutory provision with respect to pain.

It seems clear from the conference report and the statement of Congressman Pickle, a House manager of the bill, that it was the intent of Congress to write the regulation dealing with pain into the statute. That this result was accomplished is evidenced by the fact that the amended statute closely tracks the regulations.

The question, then, is does the amended statute negate the settlement agreement approved by this Court. We conclude it does not. The Secretary's sup-

plemental brief of August 1, 1984, quoted above, provides the rationale for this conclusion.

Our understanding is simply this: The amended statute on pain evaluation requires the Secretary and adjudicator to follow regulation § 404.1529 and ruling SSR 82-58 in evaluating pain until January 1, 1987. Adjudicators are to do so, however, in light of the settlement agreement which recognized that some adjudicators had misinterpreted SSR 82-58. It follows that all pain cases in the Eighth Circuit currently under evaluation at the administrative or judicial level will be evaluated on the basis of the amended statute, regulation § 404.1529, and ruling SSR 82-58 as clarified by the settlement agreement. Cases filed after this date will be evaluated on the same basis. As we stated in our opinion of July 17, 1984, the settlement agreement is "a correct statement of the law concerning evaluation of pain and other subjective complaints for determining disability." It would thus seem that any differences between the Secretary and this Circuit with respect to the law relating to the evaluation of pain have been resolved and that there is no longer a question of nonacquiescence on the part of the Secretary although questions as to the substantiality of evidence in pain cases will undoubtedly continue to arise in the future.

There remain a number of specific problems with which we now deal.

Some named and unnamed members of the *terminated* class claim that the pain standard has been incorrectly applied in their cases. In such instances, the claim must be remanded to the Secretary, who will review their cases in light of the 1984 Act and this opinion.

Other named plaintiffs raising the pain issue (but not the issue of medical improvement) have cases pending before this Court or district courts within the Circuit. These cases should be decided in accordance with this opinion by the courts having jurisdiction of the cases. Cases may be remanded to the Secretary where substantial evidentiary questions remain.

The class as certified also includes claimants whose disability claims were denied by the Secretary but who at the time of certification were still pursuing administrative appeals, or if not pursuing administrative appeals, were not time barred from doing so. As to these claims, the district court concluded that a waiver of the requirement of exhaustion was appropriate in this case. This is the most difficult issue in this appeal. The Secretary argues that the Court does not have jurisdiction over these cases and so must vacate this portion of the district court's preliminary injunction under the Social Security Act, 42 U.S.C. § 405(g) (1982), and the mandamus statute, 28 U.S.C. § 1361 (1982). We find that the Court does have jurisdiction over these claims and that this carefully defined section of the class is entitled to relief.

Section 405(g) provides that:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the dis-

> trict court of the United States for the judicial district in which the plaintiff resides * * *.

This section involves several elements: (1) the individual must have presented a claim for benefits to the Secretary, and (2) the individual must have exhausted the administrative remedies established by the Secretary. The first requirement is "jurisdictional" in the sense that it may not be waived; the second requirement may be waived by either the Secretary or the courts. *Heckler v. Ringer*, 52 U.S.L.W. 4547, 4551 (May 14, 1984); *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976); *Mental Health Association of Minnesota v. Heckler*, 720 F.2d 965, 969 (8th Cir. 1983). Each of the class members has submitted a claim for disability benefits to the Secretary; none, however, exhausted his or her administrative remedies. Thus, the question is whether the district court properly waived the exhaustion requirement for them.

As we noted in *Mental Health Association of Minnesota v. Heckler*, 720 F.2d at 969, "[t]he Supreme Court has taken a rather pragmatic approach" to this requirement. In *Mathews v. Eldridge*, 424 U.S. at 330, the Supreme Court acknowledged that, while the waiver determination generally belongs to the Secretary, "cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." It went on to determine that waiver was proper because the plaintiff's legal claim was entirely collateral to his substantive claim of entitlement, and he had "at least a colorable claim that * * * an erroneous termination would damage him in a way not recompensable through retroactive

payments." *Id.* at 331 (footnote omitted). *See also Heckler v. Ringer*, 52 U.S.L.W. at 4551-52.

The Second Circuit also recently suggested that analysis of whether waiver is appropriate requires a flexible, pragmatic approach:

> Although *Eldridge* and *Ringer* make clear the circumstances that permit a court to waive exhaustion, they do not establish whether each of the individual factors deemed relevant in those decisions—futility, collaterality, and irreparable harm—must be present before a court may dispense with exhaustion. In the absence of express guidance, we have taken the view that no one factor is critical. * * * We have adopted a more general approach, balancing the competing considerations to arrive at a just result under the circumstances presented.

City of New York v. Heckler, No. 84-6037, slip op. 6015, 6027-28 (2d Cir. Aug. 27, 1984) (citation omitted).

We determined in *Mental Health* that waiver of the exhaustion requirement was proper, based upon a pragmatic analysis of the claimants' interest in judicial review at that point in the proceedings and the relative harm to the agency's administrative process. *Mental Health Association of Minnesota v. Heckler*, 720 F.2d at 970-71. A similar pragmatic analysis leads us to conclude that waiver is appropriate in this case for several reasons. First, the district court found, and we agree, that the plaintiffs face potentially irreparable harm. In the district court's words,

> It is hard to envision a more urgent situation. Claimants who lose or are denied benefits face

> foreclosure proceedings on their homes, suffer utility cutoffs and find it difficult to purchase food. They go without medication and doctors' care; they lose their medical insurance. They become increasingly anxious, depressed, despairing—all of which aggravates their medical conditions.

Polaski v. Heckler, 585 F. Supp. 1004, 1013 (D. Minn. 1984).

Secondly, deference to the Secretary's judgment concerning exhaustion is inappropriate in light of the plaintiffs' contention that administrative adjudicators at every level have evaluated complaints of pain using an improper standard. As noted above, the Secretary herself acknowledged that

> some adjudicators may have misinterpreted the Secretary's policies as enunciated in SSR-82-58.
>
> In particular, some adjudicators may have misinterpreted Example No. 2 in SSR-82-58 to allow allegations of pain to be disregarded solely because the allegations are not fully corroborated by objective medical findings typically associated with pain.

Polaski v. Heckler, 739 F.2d at 1322.

This Court has reversed the Secretary's denial of disability due to her failure to follow the proper pain standard on a number of occasions. In 1984 alone, we reversed or remanded to the Secretary because of inadequate consideration of pain in at least thirteen cases, while affirming the Secretary's analysis of pain or other subjective complaints in none. *Douglass v. Schweiker*, 734 F.2d 399 (8th Cir. 1984); *Carpenter v. Heckler*, 733 F.2d 591 (8th Cir. 1984); *Reinhart v. Secretary of Health and Human Serv-*

ices, 733 F.2d 571 (8th Cir. 1984); *Ledoux v. Schweiker*, 732 F.2d 1385 (8th Cir. 1984); *Nunn v. Heckler*, 732 F.2d 645 (8th Cir. 1984); *Marshall v. Heckler*, 731 F.2d 555 (8th Cir. 1984); *Brissette v. Heckler*, 730 F.2d 548 (8th Cir. 1984); *Allred v. Heckler*, 729 F.2d 529 (8th Cir. 1984); *Smith v. Schweiker*, 728 F.2d 1158 (8th Cir. 1984); *Layton v. Heckler*, 726 F.2d 440 (8th Cir. 1984); *Basinger v. Heckler*, 725 F.2d 1166 (8th Cir. 1984); *Tome v. Schweiker*, 724 F.2d 711 (8th Cir. 1984); *Warner v. Heckler*, 722 F.2d 428 (8th Cir. 1984). As in *Mental Health*, the high reversal rate "fortifies our decision to waive exhaustion in light of the potentially irreparable harm incurred by the plaintiffs as a result of this procedural irregularity." *Mental Health Association of Minnesota v. Heckler*, 720 F.2d at 970.

Third, at the time this appeal was submitted, the Secretary argued strenuously that she was acquiescing in this Circuit's decisions concerning the pain standard, although she acknowledged that the standard may have been misapplied by some administrative adjudicators. In light of the Secretary's position, we deferred our disposition of this appeal in order to permit the Secretary and the plaintiffs to achieve a settlement agreement on the proper pain standard. We took this step also because it allowed the Secretary to pursue the national uniformity of administration which she contends is so important. As a result of the parties' settlement agreement, all class members whose claims have been decided since July 17, 1984, will have their claims re-decided under the proper pain standard. Those class members whose claims were decided before this date have not received this relief. This result is not only unfair, but if permitted, would diminish the Court's author-

ity to direct uniform and equitable relief in class actions.

Fourth, in light of the relief sought by the plaintiffs, deferring to the agency is both unnecessary and inappropriate. At this point in the proceedings no further elaboration of agency policy is likely. The parties' stipulation on pain and the 1984 Act have resolved the controversy over the appropriate standard. All that remains is to give these class members a chance to have their complaints of disabling pain evaluated under the correct standard.

Finally, the plaintiffs' claims are admittedly not "wholly collateral" to their claims for benefits, as was true in *Eldridge*. But the focus of their relief as a class—the Secretary's compliance with our case law and the 1984 Act—is substantially collateral to the issue of whether they are in fact disabled and entitled to benefits. *See City of New York v. Heckler*, slip op. at 6028-29; *Mental Health Association of Minnesota v. Heckler*, 720 F.2d at 971.[3]

The district court narrowly tailored the class to meet the sixty-day requirement of section 405(g). Only those class members who received an adverse decision from the Secretary within sixty days prior to the filing of the relevant class actions are entitled to relief here.[4]

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[3] In light of our conclusion that there is jurisdiction under section 405(g), it is unnecessary for us to consider whether the mandamus statute provides an alternate basis for jurisdiction.

[4] The class members are those as described above who received an adverse decision within the following time periods:

1) in Minnesota, North Dakota, South Dakota, Nebraska, and Missouri, those persons who received an ad-

Accordingly, those class members who were denied disability benefits on medical or medical-vocational grounds before July 17, 1984 (the date of our order), alleging that they cannot work due to pain or other subjective complaints, and who, although not time barred, have not yet fully exhausted their administrative appeals are entitled to have their claims reconsidered by the Secretary under the proper pain standard. The Secretary shall, within a reasonable time, issue a written notice to these class members (with a copy to their legal representatives, if any) which:

1) Informs each member of the class of the proper pain standard;

2) Asks each member of the class whether he or she contends he or she is unable to work in whole or in part because of pain as defined in the standard;

3) States that each member of the class has a right, if he or she chooses, to have his or her claim reconsidered under the proper pain standard; and

4) Contains other information concerning the availability of attorneys under the Social Security Act to assist claimants in their efforts to gain benefits.

Upon receiving a written request for reconsideration within time limits established by the Secretary,

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verse decision on or after January 30, 1984, through July 16, 1984;

2) in Arkansas, those persons who received an adverse decision at the ALJ or Appeals Council levels on or after February 20, 1984, through July 16, 1984; and

3) in Iowa, those persons who received an adverse decision on or after November 26, 1983, through July 16, 1984.

See Polaski v. Heckler, 585 F. Supp. 1004, 1006-07 & n.1 (D. Minn. 1984).

the Secretary shall consider the application under the proper pain standard and shall issue a written decision within a reasonable time. No deadlines, and no interim benefits to class members whose claims were not reconsidered by a deadline, are required of the Secretary. The district court shall thus retain jurisdiction over the pain cases in this manner.

IV. CONCLUSION.

This case is remanded to the district court with directions to proceed in a manner consistent with this opinion.

JOHN R. GIBSON, Circuit Judge, concurring in part and dissenting in part.

While I agree with a substantial part of what the court holds today, I am unable to agree that the district court properly waived the requirement of exhaustion of administrative remedies for those class members who alleged disabling pain but did not pursue timely appeals after denial of their claims. The court today considerably exceeds the limits of the waiver doctrine as set down in *Mental Health Association v. Heckler*, 720 F.2d 965 (8th Cir. 1983). Several factors present in *Mental Health* are not present in this case, the most notable being that the claimants in *Mental Health*, because of their conditions, were often incapable of understanding or effectively using their appeal rights. *Id.* at 970. Given the extensive public discussion of the Social Security situation in this circuit from late November 1983 through July 16, 1984, I find it hard to believe that persons truly threatened with such irreparable harm as hypothesized by the court would not have sought administrative review of the denials of their benefits.

In addition, in *Mental Health* there was a finding by the district court that an improper presumption was being applied; thus, we held, additional agency proceedings would not result in further clarification of agency policy and immediate court review would not "interfere prematurely with agency procedures." *Id.* at 970-71. Here, while there have been many misapplications of the pain standard, the July 17, 1984, stipulation concerning the standard in such cases does not demonstrate the existence of an erroneous policy or procedure. *Polaski v. Heckler*, 739 F.2d 1320, 1321-22 (8th Cir. 1984). There is less reason to believe that blanket court intervention is necessary and I would defer to normal agency procedures, including the Secretary's decisions on when waiver of exhaustion is appropriate.

The extension of *Mental Health* to the facts of this case is contrary to the principles laid down in *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976) (waiver of exhaustion requires the existence of a challenge entirely collateral to the substantive claim of entitlement plus a colorable claim of irreparable harm). Accordingly, I dissent from that portion of the opinion dealing with the waiver of exhaustion, commencing on page 15 of the court's opinion. I would not allow those seeking administrative review to continue in this litigation.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 84-5085

LORRAINE POLASKI, ET AL., APPELLEES

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

Submitted June 12, 1984

Decided July 17, 1984

Before HEANEY, JOHN R. GIBSON and FAGG, Circuit Judges.

ORDER

On January 20, 1984, Lorraine Polaski filed a complaint in federal district court for the District of Minnesota, seeking review of the termination of her social security disability benefits by the Secretary of Health and Human Services (Secretary). She later successfully amended her complaint to pursue her case as a class action on behalf of similarly situated disabled persons within the Eighth Circuit. The amended complaint alleges: first, that the Secretary is not following Eighth Circuit law by requiring that objective medical evidence fully corroborate a dis-

ability claimant's allegations of pain and other subjective complaints; and second, that the Secretary is not following Eighth Circuit law by terminating disability benefits absent new evidence demonstrating either that the claimant's condition has materially improved or that the original decision granting benefits was erroneous.

On April 27, 1984, the district court issued a preliminary injunction and revised its class certification order, 585 F.Supp. 1004. The court determined that the Secretary was nonacquiescing in Eighth Circuit decisions concerning both the standard for evaluating pain and other subjective complaints and the standard for evaluating medical improvement. The court enjoined the Secretary from denying or terminating disability benefits without following those decisions. It also provided for reconsideration of the claims of persons within the class under the proper standards.

On May 1, 1984, the Secretary sought an emergency stay of the preliminary injunction pending appeal to our Court. The district court denied the motion for a stay on May 2, 1984. The Secretary filed a notice of appeal on May 15, 1984. On May 25, 1984, our Court granted a temporary stay pending appeal. We heard oral argument on June 12, 1984.

In her brief and at oral argument, the Secretary maintained that she had been applying Eighth Circuit cases concerning the standard for evaluating allegations of pain and other subjective complaints. At the conclusion of oral argument, we stated from the bench that our Court would defer any immediate action in order to allow the parties a chance to reach an agreement on the standard to be used in evaluating pain and other subjective complaints in cases within the Eighth Circuit.

On July 11, 1984, the Justice Department notified this Court that the parties reached a settlement, agreeing that the relevant standard is as follows:

> A claimant has the burden of proving that the disability results from a medically determinable physical or mental impairment. Symptoms such as pain, shortness of breath, weakness, or nervousness are the individual's own perceptions of the effects of a physical or mental impairment(s). Because of their subjective characteristics and the absence of any reliable techniques for measurement, symptoms (especially pain) are difficult to prove, disprove, or quantify. As a result of this difficulty, some adjudicators have misinterpreted the Secretary's policies as enunciated in SSR-82-58.
>
> In particular, some adjudicators may have misinterpreted Example No. 2 in SSR-82-58 to allow allegations of pain to be disregarded solely because the allegations are not fully corroborated by objective medical findings typically associated with pain. The example should not be construed to be inconsistent with the text of SSR-82-58 which states in part:
>
> > The effects of symptoms must be considered in terms of any additional physical or mental restrictions they may impose beyond those clearly demonstrated by the objective physical manifestations of disorders. Symptoms can sometimes suggest a greater severity of impairment than is demonstrated by objective and medical findings alone.
>
> While the claimant has the burden of proving that the disability results from a medically ter-

minable physical or mental impairment, direct medical evidence of the cause and effect relationship between the impairment and the degree of claimant's subjective complaints need not be produced. The adjudicator may not disregard a claimant's subjective complaints solely because the objective medical evidence does not fully support them.

The absence of an objective medical basis which supports the degree of severity of subjective complaints alleged is just one factor to be considered in evaluating the credibility of the testimony and complaints. The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:

1. the claimant's daily activities;

2. the duration, frequency and intensity of the pain;

3. precipitating and aggravating factors;

4. dosage, effectiveness and side effects of medication;

5. functional restrictions.

The adjudicator is not free to accept or reject the claimant's subjective complaints *solely* on the basis of personal observations. Subjective complaints may be discounted if there are inconsistencies in the evidence as a whole. [Emphasis in original.]

The parties also agreed that the Secretary will transmit the agreed-upon language to adjudicators

within the Eighth Circuit responsibile for determining disability, including personnel in state and district offices, and personnel within the Social Security Administration, ALJs, and the Appeals Council. The language is to be transmitted no later than July 18, 1984.

This Court agrees with the above language as a correct statement of the law concerning the evaluation of pain and other subjective complaints for determining disability. This language thus serves as a correct restatement of our case law, to be followed in all administrative and judicial proceedings within the Eighth Circuit.

This order shall be issued forthwith. All other questions raised in this appeal are reserved for further decision by this Court.

APPENDIX E

UNITED STATES DISTRICT COURT
D. MINNESOTA
FOURTH DIVISION

Civ. No. 4-84-64

LORRAINE POLASKI, ET AL., PLAINTIFFS

v.

MARGARET M. HECKLER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT

April 17, 1984

ORDER

MILES W. LORD, Chief Judge.

This matter comes before the court on plaintiff's motions for conditional class certification, leave to file an amended complaint and a temporary restraining order. The central issues at the heart of these motions concern certain standards used by the Secretary of Health and Human Services (Secretary) in evaluating claims for disability insurance benefits under Title II and Title XVI of the Social Security Act.

Plaintiff Lorraine Polaski is a 50-year-old resident of Hennepin County who began receiving disability benefits in 1979. Four years later, in 1983, the Secretary declared that Polaski was no longer disabled and therefore terminated her benefits. Polaski contends that this decision was not supported by substantial evidence because it improperly discounted her allegations of pain and because there was no evidence to show either that her condition had improved or that the original decision finding her disabled was erroneous.

Polaski further contends that hers is not an isolated case of improper decision-making by the Secretary. Instead, Polaski argues that the Secretary is using erroneous standards on pain and medical improvement on a systemwide basis and that the Secretary's policies run contrary—directly and flagrantly—to the law as set out by the Court of Appeals for the Eighth Circuit. Thus, Polaski seeks to expand her action to include other disability claimants who find themselves in a position similar to hers.

AMENDED COMPLAINT

Polaski moves to file an amended complaint, which includes class action allegations and seeks declaratory and injunctive relief on a class-wide basis.

After plaintiff filed this motion for an amended complaint, the Secretary on April 13 declared a nationwide moratorium on the termination of benefits under Title II and Title XVI on medical or medical-vocational grounds. The government now claims that the amended complaint should not be allowed because members of the proposed class are either non-existent or unidentifiable at the present time. Counsel for plaintiff strongly disagree. They contend that the

moratorium declared by the Secretary does not affect plaintiff Polaski and other individuals like her whose benefits have been terminated and who have exhausted their administrative remedies before the Secretary. This much appears clear from this court's interpretation of the Secretary's moratorium. Likewise, as argued by plaintiff's counsel, the moratorium does not affect first-time applicants who have received an adverse determination before the Secretary where they have claimed disability based upon their subjective complaints of pain.

Furthermore, federal courts follow a liberal policy in allowing motions to amend pleadings. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed. 2d 222 (1962); *Buder v. Merrill Lynch, Pierce, Fenner & Smith*, 644 F.2d 690, 694 (8th Cir.1981). As stated in Rule 15(a), Fed.R.Civ.P., "leave [to amend pleadings] shall be freely given when justice so requires."

For these reasons, the court concludes that the amended complaint, with the addition of named plaintiff Patrick Blaschko, is proper and shall be allowed.

CLASS CERTIFICATION

The class which plaintiff seeks to certify consists of other claimants who allege that they are unable to work because of pain or other subjective complaints and/or that their medical condition has not improved since their initial applications for disability status were approved. More precisely, the class as proposed by plaintiffs is defined as follows:

> All persons residing in Minnesota, North Dakota, South Dakota, Missouri, Nebraska or Iowa,

(a) Who have been or will be notified that their application for Title II and/or Title XVI benefits have been denied or that their Title II and/or Title XVI benefits are being terminated on medical or medical/vocational grounds; and

(b) Who allege that they are unable to work in whole or in part because of pain or other subjective complaints and/or that their medical condition has not improved; and

(c) Who are pursuing or will pursue timely, administrative or judicial appeals, or, if not pursuing timely appeals, who have received or will receive an adverse decision at any level of the administrative review process on or after January 30, 1984,

(d) Provided, however, that the class of persons whom plaintiffs represent shall exclude persons who are members of class actions which have been certified in any court in the Eighth Circuit which challenge the Secretary's policy with regard to a medical improvement standard or the evaluation of pain and other subjective complaints; provided that such persons shall be excluded from this class only with regard to the issue or issues actually being litigated in such other certified class actions.

This proposed class was defined to include all claimants within the jurisdiction of the Court of Appeals for the Eighth Circuit whose claims regarding the Secretary's standards on pain and medical improvement are not already being dealt wtih in some type of unified action. Thus, the proposed class does not include claimants residing in Arkansas, which has imposed its own moratorium on benefits terminations and which has been following the law

of the Eighth Circuit regarding pain and medical improvement for some time. Likewise, the class would not include claimants alleging disability due to pain in Missouri, where a class already has been certified on this issue. (The Missouri class is the only one brought to this court's attention which would be covered by paragraph (d) of the present class certification).

The class includes only those claimants whose cases have been decided on medical or medical-vocational grounds. The class does not include persons who have had their disability claims decided on other grounds, such as refusal to cooperate, excess assets, or engaging in substantial gainful activity.

This court finds that the proposed class meets all of the requirements for certification as set out in Rule 23(a) and (b)(2), Fed.R.Civ.P.

The class as defined is so numerous that "joinder of all members is impracticable." Rule 23(a)(1), Fed.R.Civ.P. Using projections and extrapolations from government data, plaintiffs estimate that the class includes 4,200 claimants whose benefits were terminated without the use of a medical improvement standard and 2,430 claimants whose allegations of pain or other subjective symptoms were improperly evaluated. This amounts to a class size of 6,630, clearly satisfying the numerousity requirements of Rule 23.

This case involves common questions of law and fact concerning the Secretary's policies as to the evaluation of pain or other subjective complaints and medical improvement. These policies appear to have been promulgated at the highest level of the Social Security Administration and appear to have been applied uniformly to the class as a whole. The claims of the

representative parties are typical of those of the class, and final injunctive or declaratory relief may well be appropriate. Thus, the requirements of Rule 23(a)(2), 23(a)(3) and 23(b)(2) are met.

This court is also satisfied that the representative parties "will fairly and adequately protect the interests of the class." Rule 23(a)(4), Fed.R.Civ.P. Plaintiffs' counsel are legal services attorneys with extensive experience in the areas addressed by this action and will vigorously puruse the litigation.

Finally, this court has jurisdiction over all members of this proposed class by virtue of both section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), and the mandamus statute, 28 U.S.C. § 1361. *Mental Health Association of Minnesota v. Heckler*, 720 F.2d 965 (8th Cir.1983).

TEMPORARY RESTRAINING ORDER

Plaintiffs seek a temporary restraining order to enjoin the Secretary from applying the improper pain and medical improvement standards and to require the Secretary to freeze certain case files in their current locations. This order would halt the denial and termination of benefits, thereby preserving the status quo until this court can make a ruling on the proper standards and the appropriateness of further relief.

This court finds that such an order is warranted at this time, the plaintiffs having demonstrated with ample sufficiency that they have an excellent chance of succeeding on the merits of their action, that they will suffer irreparable harm if a restraining order is not entered forthwith, that the impact of this order on the Secretary is far outweighed by the interests of the plaintiffs in obtaining immediate relief and that the order is in the public interest. *See Data-*

phase Systems, Inc. v. CL Systems, Inc., 640 F.2d 109, 114 (8th Cir.1981).

Plaintiffs claim in essence that the Secretary has placed herself above the law by refusing to comply with the edicts of the Court of Appeals for the Eighth Circuit.

On the issue of pain, plaintiffs cite to some 19 cases which hold that the Secretary must give serious consideration to a claimant's subjective complaints of pain, even where such complaints are not fully corroborated by objective medical evidence.[1] Despite these rulings, the Secretary appears to continue to require the individuals claimant to prove a direct cause and

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[1] The cases cited by the plaintiffs are:

Yawitz v. Weinberger, 498 F.2d 956 (8th Cir. 1974); *Lund v. Weinberger*, 520 F.2d 782 (8th Cir. 1975); *Brand v. Secy. of Dept. of Health, Etc.*, 623 F.2d 523 (8th Cir. 1980); *Ragsdale v. Secy. of Dept. of Health*, 623 F.2d 528 (8th Cir. 1980); *Cole v. Harris*, 641 F.2d 613 (8th Cir. 1981); *Tucker v. Schweiker*, 689 F.2d 777 (8th Cir. 1982); *Thorne v. Schweiker*, 694 F.2d 170 (8th Cir. 1983); *McDonald v. Schweiker*, 698 F.2d 361 (8th Cir. 1983); *Simonson v. Schweiker*, 699 F.2d 426 (8th Cir. 1983); *O'Leary v. Schweiker*, 710 F.2d 1334 (8th Cir. 1983); *Bastian v. Schweiker*, 712 F.2d 1278 (8th Cir. 1983); *Nettles v. Schweiker*, 714 F.2d 833 (8th Cir. 1983); *Baugus v. Scy. of HHS*, 717 F.2d 443 (8th Cir. 1983); *Streissel v. Schweiker*, 717 F.2d 1231 (8th Cir. 1983); *Mallet v. Schweiker*, 721 F.2d 256 (8th Cir. 1983); *Warner v. Heckler*, 722 F.2d 428 (8th Cir. 1983); *Tome v. Schweiker*, 724 F.2d 711 (8th Cir. 1983); *Nelson v. Heckler*, 712 F.2d 346 (8th Cir. 1983); *Hillhouse v. Harris*, 715 F.2d 428 (8th Cir. 1983).

This list does not include the numerous decisions of district courts which also direct the Secretary to employ the proper standard regarding complaints of pain. *See, e.g., Roberts v. Schweiker*, 583 F.Supp. 724 (D.Minn.1984); *Fenus v. Schweiker*, 584 F.Supp. 45 (D.Minn.1983).

effect relationship between the objective medical evidence and the amount of pain suffered.

Such is the burden placed upon plaintiff Polaski, whose claim for disability benefits rests upon her allegations of severe and continuous pain. After receiving notice of her termination from benefits, Polaski requested and received a hearing before an administrative law judge (ALJ). In evaluating Polaski's claims of pain, the ALJ first gave lip service to the Eighth Circuit's rulings and then concluded that "none of the medical reports contain any significant findings to substantiate constant, severe, intractable pain." (Transcript of administrative proceedings, p. 28).

The Court of Appeals recently took note of the Secretary's policy of disregarding the law of this circuit:

> For some unexplained reason, the Secretary insists upon ignoring this Court's statements with respect to the proper evaluation of pain. The Secretary must give consideration to subjective complaints of pain and may not disregard them solely because they are not fully corroborated by the objective medical evidence.

Nelson v. Heckler, 712 F.2d 346, 348 (8th Cir. 1983).

The Eighth Circuit again had occasion to criticize the Secretary for failing to abide by the proper standard in the case of *Hillhouse v. Harris*, 715 F.2d 428, 430 (8th Cir. 1983). The court, in quoting from the lower court opinion, stated:

> The result of this individual case should not obscure the fact that the regulations of HHS are not the supreme law of the land. 'It is emphatically the province and duty of the judicial de-

> partment, to say what the law is,' *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1904); and the Secretary will ignore that principle at his peril.

715 F.2d at 430. Judge McMillian in the same case commented separately:

> While I concur wholly in everything said in the majority opinion, I think more is needed to be expressed. I have no wish to invite confrontation with the Secretary. Yet, if the Secretary persists in pursuing here nonacquiescence in this circuit's decisions, I will seek to bring contempt proceedings against the Secretary both in her official and individual capacities.

Id. at 430.

In a recent law review article, Judge Heaney of the Eighth Circuit recognized the Secretary's policy of nonacquiescence:

> The SSA apparently has directed that decisions of both the district courts and the courts of appeals should be ignored in deciding whether to grant or deny benefits to individual claimants. A memo to all ALJs dated January 7, 1982, from the Associate Commissioner of the Office of Hearings and Appeals, is typical of the Secretary's approach. The memo emphasized that the Deputy Assistant General Counsel 'stressed the point that the federal courts do not run SSA's programs, and that the ALJs are responsible for applying the Secretary's policies and guidelines *regardless of court decisions below the level of the Supreme Court.*'

Heaney, *Why the High Rate of Reversals in Social Security Disability Case?*, 7 Hamline Law Review 1, 9 (1984).

Plaintiffs also claim that the Secretary has failed to follow the proper standard in termination cases. Historically, the Secretary in such cases had employed a medical improvement standard, under which the claimant's current conditions was compared with the condition supporting the original finding of disability, and benefits were terminated only if claimant's condition showed the requisite improvement. *See Graham v. Heckler*, 573 F.Supp. 1573, 1575 n. 1 (W.Va. 1983). Sometime in 1980, the Secretary abandoned this policy, and adopted a "current disability" standard for termination of disability benefits. Once this new policy reached the courts by way of appeal, it was overwhelmingly rejected as improper. *See, e.g., Lopez v. Heckler*, 725 F.2d 1489 (9th Cir. 1984); *Dotson v. Schweiker*, 719 F.2d 80 (4th Cir. 1983); *Kuzmin v. Schweiker*, 714 F.2d 1233 (3rd Cir. 1983); *Simpson v. Schweiker*, 691 F.2d 966 (11th Cir. 1982); *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982); *Weber v. Harris*, 640 F.2d 176 (8th Cir. 1981); *Hyatt v. Heckler*, 579 F.Supp. 985 (N.C. 1984); *Doe v. Heckler*, 576 F.Supp. 463 (Md. 1983); *Graham v. Heckler*, 573 F.Supp. 1573 (W.Va. 1983); *Musgrove v. Schweiker*, 552 F.Supp. 104 (Pa. 1982); *Shaw v. Schweiker*, 536 F.Supp. 70 (Pa. 1982). These courts have all held that the Secretary must follow the medical improvement standard, and that the burden of showing the necessary improvement rests with the Secretary.

Plaintiffs argue that the Secretary has violated both the Social Security Act and the Constitution by failing to follow the proper standards regarding pain

and termination. The cases cited by plaintiffs strongly support a finding that the Secretary is not adhering to its constitutional duty to provide due process to individual claimants. By not following the law of this circuit, the Secretary adopts a course of action in disregard of the fundamental fairness due each claimant. The Secretary further appears to be in violation of the constitutional doctrine of separation of powers. As was first made clear in the Supreme Court case of *Marbury v. Madison*, *supra*, it is the duty of government agencies to follow the law as interpreted by the courts. Apparently, the Secretary has chosen not to do so. While this court is now considering these matters only preliminarily, it is convinced that there is a strong likelihood that plaintiffs will prevail on the merits of their claims. A further and more detailed discussion of these issues will be required upon a full hearing on plaintiffs' motion for a preliminary injunction.

As for irreparable harm, the class of plaintiffs consists of disabled persons for whom Social Security benefits may be their sole source of support. Substantial and irreparable harm is likely to befall these people if their benefits are denied or terminated.

Affidavits submitted by plaintiffs demonstrate the urgency of their plight. Plaintiff Polaski, who states that her disability is worsening, is not able to buy the basic necessities of life without her disability benefits. Carrie F. Turner, a Missouri woman with a heart condition whose benefits were cut off in 1982, states in her affidavit that she has been forced to borrow money from her mother and daughter, whose income derive, in turn, solely from Social Security and AFDC payments. Turner does not have enough money to pay her bills for utilities, food, medications.

She begs for assistance at churches and social agencies.

The hardships of the class were summed up in affidavits filed by James Marshall Smith, an attorney with Legal Aid of Western Missouri, and Doretta Henderson, chairperson of the Kansas City Chapter of the National Welfare Rights Organization, as follows:

> During the appeal period in federal court, which can frequently take in excess of one year, our clients are without benefits. They have many other legal problems as a result, such as eviction suits, collection suits from creditors, problems with utility shut offs, etc. Within the last eighteen months I can remember offhand five of our clients who have died during the appeal process. (Affidavit of Smith)
>
> After being terminated from benefits, many individuals are unable to pay for medical care and obtain the necessary prescriptions for their illness. We also find that individuals often are unable to pay their rent or housing costs, with some individuals losing their homes because of their inability to meet the payments. (Affidavit of Henderson)

In sum, this court finds that plaintiffs have satisfied all of the requirements for a temporary restraining order. Plaintiff Polaski has properly presented her claims before this court and has exhausted her administrative remedies. Only before this court can she—and the class members whom she represents—pursue full and adequate relief.

Accordingly, IT IS HEREBY ORDERED That defendant, her employees, agents and assigns shall:

1. Be enjoined from denying or terminating Title II benefits and from denying Title XVI benefits at any level of administrative review, and from terminating Title XVI benefits at the Administrative Law Judge or Appeals Council levels until a further order of this court concerning the proper standards to be used for the evaluation of pain and other subjective complaints and the proper medical improvement standard.

2. Assure that all Social Security Administration District Offices within the Eighth Circuit retain all Title II and/or Title XVI files in which an adverse initial or reconsideration determination has been or will be made dated on or after January 30, 1984 unless or until the claimant files a timely appeal;

3. Assure that the Appeals Council of the Social Security Administration retains all files in which an adverse decision has been or will be rendered by an Administrative Law Judge or by the Appeals Council dated on or after January 30, 1984 unless or until it is appealed;

4. Issue a teletype to all Social Security Administrative District Offices within the Eighth Circuit and to the Appeals Council containing the instructions set forth in the foregoing paragraphs 1, 2 and 3 within 24 hours of the issuance of this order. The defendant shall send copies of the teletype to plaintiffs' attorneys and to this court.

This temporary restraining order shall stand until the court issues a further order regarding a preliminary injunction, a hearing for which has been set for 2 p.m. April 26.

IT IS FURTHER ORDERED That plaintiffs' motion for leave to file an amended complaint is granted.

IT IS FURTHER ORDERED That plaintiffs' motion for class certification, as defined by this order, is granted.

IT IS FURTHER ORDERED That the government's motions to stay proceedings and to strike portions of plaintiffs' complaint are denied.

IT IS FURTHER ORDERED That by 5 p.m. April 24, 1984, the parties shall provide to this court briefs detailing their respective positions concerning possible future relief for this class, particularly on the issue of the immediate reinstatement of benefits for those individuals whose benefits have been terminated and the immediate payment of benefits to class members whose initial applications have been denied.

IT IS FURTHER ORDERED That by 5 p.m. April 24, 1984, the Secretary shall provide to this court an estimate of the number of persons covered by the class as defined by this order.

APPENDIX F

UNITED STATES COURT OF APPEALS
D. MINNESOTA
FOURTH DIVISION

Civ. 4-84-64

LORRAINE POLASKI, ET AL., PLAINTIFFS

v.

MARGARET M. HECKLER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT

April 27, 1984

ORDER

MILES W. LORD, Chief Judge.

INTRODUCTION

Plaintiffs in this class-action suit against the Secretary of Health and Human Services (Secretary) seek a preliminary injunction which would, in essence, compel the government to use the proper standards in evaluating claims for disability insurance benefits under Titles II and XVI of the Social Security Act. After a hearing on April 17, 1984, this court certified a class and issued a temporary re-

straining order to freeze the situation pending further review. A second hearing was held on April 26, 1984, to consider whether a preliminary injunction should issue and, if so, what preliminary relief would be appropriate. The present order is based upon the evidence presented at those hearings and the extensive briefs submitted by the parties.

For several years now, the courts of this circuit have found themselves embroiled in an increasingly frustrating effort to persuade the Secretary to follow their decisions regarding certain legal standards under the disability insurance program. The Secretary, in an apparent effort to reduce the number of disability beneficiaries, has taken a more restrictive approach in recent years in determining eligibility. Often, the Secretary has stuck to this restrictive path even when it has led to direct contravention of federal court edicts. By proceeding in such a manner, the Secretary also has disregarded the fundamental policies at the heart of the disability program:

> Congress enacted the social security disability insurance program in order to provide benefits to individuals who become disabled and can no longer "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." The program is intended to aid workers who, after having contributed to the nation's workforce, are unable to continue to do so because of a disability. The underlying purpose of this program is to ease the economic dislocations and hardships that often accompany disability. The Act is a remedial one which should be broadly construed and liberally applied to effectuate its humanitarian goals.

Judge Gerald W. Heaney, *Why the High Rate of Reversals in Social Security Disability Cases?*, 7 Hamline Law Review 1, 2 (1984) (footnotes omitted).

In the present action, plaintiffs challenge two specific policies of the Secretary: (1) the agency policy of requiring objective medical evidence to *fully corroborate all* allegations of pain and other subjective complaints, and (2) the agency policy of terminating disability benefits without *new evidence* showing that the claimant's medical condition has improved or that the prior decision was erroneous. Plaintiffs contend that these policies violate the Social Security Act as well as the separation of powers doctrine and due process rights under the U.S. Constitution.

JURISDICTION

At the threshold, the Secretary argues that this court lacks the jurisdiction to consider this action. The Secretary's extended arguments along this line however, ignore principles that have by now become well-established in actions of this nature. *See, e.g., Mental Health Association of Minnesota v. Heckler*, 720 F.2d 965, 968-71 (8th Cir. 1983). This court therefore concludes that it has jurisdiction over all members of this class by virtue of both section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), and the mandamus statute, 28 U.S.C. § 1361.

Jurisdiction under section 205(g) imposes two requirements. The first mandates that the individual present a claim to the Secretary, which all members of this class clearly have done. The second requires that the individual exhaust his administrative remedies and receive a final decision from the Secretary before seeking relief in the courts. It is true that some members of this class have not yet proceeded

through all levels of agency appeals. This second requirement is, however, waivable by either the Secretary or the courts when necessary to prevent irreparable harm or the loss of crucial collateral claims. *Mathews v. Diaz*, 426 U.S. 67, 75-77, 96 S.Ct. 1883, 1889-1890, 48 L.Ed.2d 478 (1976); *Mathews v. Eldridge*, 424 U.S. 319, 331 n. 11, 96 S.Ct. 893, 900 n. 11, 47 L.Ed.2d 18 (1976).

This court finds that such a waiver is appropriate in the present case. As set out in detail below, this class of plaintiffs will suffer irreparable harm if its claims are not acted upon immediately. This class does not have the resources to endure delay upon delay; the members of this class depend upon disability benefits to meet the most basic of their needs, to sustain their health and well-being. Further, it would be futile and inefficient to force these plaintiffs to pursue their claims through level after level of agency review when it appears that the agency is systematically relying upon improper standards. *Mental Health Association of Minnesota*, 720 F.2d at 970-71.

As for mandamus jurisdiction, it is well established that courts will assert such jurisdiction when no other adequate remedy is available and the plaintiff is owed a clear duty. *United States ex rel. Girard Trust Co. v. Helvering*, 301 U.S. 540, 543-44, 57 S.Ct. 855, 857, 81 L.Ed. 272 (1937). Such is the situation in the present action, in which a writ of mandamus would not supplant the Secretary's duty delegated authority to make the factual determinations upon which eligibility depends but would merely compel the Secretary to make such determinations in a lawful manner. *Mental Health Association of Minnesota*, 720 F.2d at 971-72 n. 17.

REVISED CLASS CERTIFICATION

Plaintiffs move for a revised class certification, apparently on the basis of newly-acquired information on the status of various class actions which have been filed but not yet certified throughout the Eighth Circuit's jurisdiction. The class as originally certified in this court's order of April 17 was defined to include disability claimants within the Eighth Circuit who have viable claims regarding the Secretary's standards on pain and medical improvement but whose claims are not already being dealt with in some other collective action.

Thus, the original certification excluded residents of Arkansas because that state had had some success on its own in convincing the agency to follow the law of the Eighth Circuit and had imposed its own moratorium on terminations under improper standards. This court is now advised, however, that the Secretary's acquiescence and the state's moratorium came as recently as December 1983. The proper standards therefore have never been applied to some applicants whose claims are still viable. Certainly, these individuals should be included in the class.

The original certification also was too narrow in that it failed to encompass individuals in Arkansas and Iowa for whom the statute of limitations had been tolled by the filing of class actions in their respective states.[1] *American Pipe and Construction Co. v. State of Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). This court finds that the class appropriately encompasses these individuals.

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[1] These putative class actions are: *Wilson v. Heckler*, LR-C-83-338 (D. Ark. 1984); *Myers v. Ross, et al.*, Civ. No. 82-170-B (D. Iowa 1982), and *Bradley v. Hecker*, No. 2c-84-3010 (D. Iowa 1984). Class certification is still pending in each of these suits.

Accordingly, this court orders that the class be redefined as follows:

> All persons residing in Minnesota, North Dakota, South Dakota, Missouri, Nebraska, Iowa, or Arkansas,
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> a) who have been or will be notified that their applications for Title II and/or Title XVI benefits have been denied or that their Title II and/or Title XVI benefits are being terminated on medical or medical vocational grounds; and
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> b) who allege that they are unable to work in whole or in part because of pain or other subjective complaints and/or that their medical condition has not improved; and
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> c) who are pursuing or will pursue timely administrative or judicial appeals, or, if not pursuing timely appeals, who have received or will receive an adverse decision at any level of the administrative review process on or after January 30, 1984, provided however that,
>
> > (1) as to those who are residents of Arkansas and who have been or will be notified that their applications for Title II and or Title XVI benefits have been denied, the class includes only (a) those who are pursuing or will pursue timely judicial appeals and (b) those who are pursuing timely administrative appeals at the Administrative Law Judge or Appeals Council level, and (c) those who received or will receive an adverse decision at the Administrative Law Judge or Appeals Council level on or after February 20, 1984;

(2) as to those who are residents of Arkansas and who have been terminated from Title II and/or Title XVI benefits, the class also includes those who have received or will receive an adverse decision at any level of the administrative review process on or after February 12, 1983; and

(3) as to those who are residents of Iowa and who have been or will be notified that their applications for Title II and/or Title XVI benefits have been denied, the class also includes those who have received an adverse decision at any level of the administrative review process on or after November 26, 1983; and

(4) as to those who are residents of Iowa and who have been or will be terminated from Title II and/or Title XVI benefits, the class also includes those who have received or will receive an adverse decision at any level of the administrative review process on or after January 13, 1982,

d) provided, further, however, that the class of persons whom plaintiffs represent shall exclude persons who are members of class actions which have been certified in any court in the Eighth Circuit which challenge the Secretary's policy with regard to a medical improvement standard or the evaluation of pain and other subjective complaints; provided that such persons shall be excluded from this class only with regard to the issue or issues actually being litigated in such other certified class actions.

PRELIMINARY INJUNCTION

The Eighth Circuit has set out a four-part test to govern the issuance of preliminary injunctions. In short, this test involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that the movant will succeed on the merits; and (4) the public interest. *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). In applying these factors, courts are advised to use a flexible and equitable approach:

> . . . [T]he question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined. The equitable nature of the proceeding mandates that the court's approach be flexible enough to encompass the particular circumstances of each case.

Id. at 113.

This court turns first to a consideration of the probability of plaintiffs succeeding on the merits of their action.

The Pain Standard

Plaintiffs argue that the Secretary is systematically applying an erroneous standard in evaluating complaints of pain. Numerous decisions of the Eighth Circuit, cited by plaintiffs, hold that subjective complaints of pain must be given serious consideration, even when not fully corroborted by objective medical evidence. *See, e.g., Brand v. Secy of Dept. of Health, Etc.*, 623 F.2d 523 (8th Cir. 1980); *Cole v. Harris*,

641 F.2d 613 (9th Cir. 1981); *Tucker v. Schweiker*, 689 F.2d 777 (8th Cir. 1982); *Simonson v. Schweiker*, 699 F.2d 426 (8th Cir. 1983); *Nelson v. Heckler*, 712 F.2d 346 (8th Cir. 1983); *Hillhouse v. Harris*, 715 F.2d 428 (8th Cir. 1983).[2] Under these decisions, all that is required is that there be medical evidence of a mental or physical impairment. Once that is established, the claimant need not show a direct cause and effect relationship between his condition and the level of pain that he suffers:

> Of course, under the Act, there must be medical evidence of physical or mental impairment. Disregard of a claimant's subjective complaints of pain, however, is not justified solely because there exists no objective evidence in support of such complaint.

Northcutt v. Califano, 581 F.2d 164, 166 (8th Cir. 1978) (footnote omitted); *Brand v. Secy. of Dept. of Health, Etc.*, 623 F.2d at 526.

To require that the medical evidence fully supports the individual's complaints of pain ignores the reality that each person is different in the way that he deals with his particular impairment:

> These claimants are real people and entitled to have their disabilities measured in terms of their total physiological well-being. Different people

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[2] This list is by no means exhaustive. In total, plaintiffs refer this court to nineteen Eighth Circuit opinions with similar holdings on the issue of pain. In addition, this list does not include the numerous decisions of the district courts which also direct the Secretary to give serious consideration to complaints of pain whether or not such complaints are fully corroborated by the medical evidence. *See, e.g., Roberts v. Schweiker*, 583 F.Supp. 724 (D. Minn. 1984); *Fenus v. Schweiker*, 584 F.Supp. 45 (D. Minn. 1983).

> react in markedly different ways to similar injuries. A back condition may affect one individual in an inconsequential way, whereas the same condition may severely disable another person who has greater sensitivity to pain or whose physical condition, due to age, obesity, deformity, or general physical well-being is generally deteriorated.

Landess v. Weinberger, 490 F.2d 1187, 1190 (8th Cir. 1974).

The Secretary argues that the pain standard enunciated by the Court of Appeals is indeed being followed. She contends that there is no systemwide policy ignoring the law of this circuit, but rather only erroneous results in certain isolated cases.

The evidence against the Secretary's argument is overwhelming. The court first turns to the very decisions of the Eighth Circuit defining the proper standard, which the Secretary argues are "isolated cases":

> For some unexplained reasons, the Secretary insists upon ignoring this Court's statements with respect to the proper evaluation of pain. The Secretary must give consideration to subjective complaints of pain and not disregard them solely because they are not fully corroborated by the objective medical evidence.

Nelson v. Heckler, 712 F.2d at 348.

The Eighth Circuit again confronted the continuing problem of the Secretary applying an improper pain standard in the case of *Hillhouse v. Harris*, *supra*. In quoting from the lower court opinion, the Eighth Circuit warned the Secretary that it considered her refusal to apply the proper pain standard as a violation of law:

> The result of this individual case should not obscure the fact that the regulations of HHS are not the supreme law of the land. 'It is emphatically the province and duty of the judicial department, to say what the law is,' *Marbury v. Madison*, 1 Cranch 137, 117, 2 L.Ed. 60 (1804); and the Secretary will ignore that principle at his peril.

715 F.2d at 430.

Commenting separately in *Hillhouse*, Judge McMillian further warned the Secretary of the consequences of her policy of nonacquiescence:

> While I concur wholly in everything said in the majority opinion, I think more is needed to be expressed. I have no wish to invite confrontation with the Secretary. Yet, if the Secretary persists in pursuing her nonacquiescence in this circuit's decisions, I will seek to bring contempt proceedings against the Secretary both in her official and individual capacities.

Id. at 430.

The Secretary contends that her regulations strictly comply with the Eighth Circuit's rulings on pain. Specifically, the Secretary points to the following:

> *How we evaluate symptoms, including pain.* If you have a physical or mental impairment, you may have symptoms (like pain, shortness of breath, weakness or nervousness). We consider all your symptoms, including pain, and the extent to which signs and laboratory findings confirm these symptoms. The effects of all your symptoms, including severe and prolonged pain, must be evaluated on the basis of a medically determinable impairment which can be shown to

> be the cause of the symptom. We will never find that you are disabled based on your symptoms, including pain, *unless medical signs or findings show that there is a medical condition that could be reasonably expected to produce those symptoms.*

20 C.F.R. § 404.1529 (emphasis added).

This regulation, contrary to the Secretary's contention, does not meet the standard declared by the Eighth Circuit for evaluating complaints of pain. The Secretary's regulation clearly requires that the individual claimant show sufficient objective proof of his subjective complaints in order to receive benefits. The cases of this circuit emphatically direct the Secretary to carefully evaluate an individual's complaints of pain, *regardless of whether or not those subjective complaints are supported by medical evidence.* Rather than adopt this standard, the Secretary has declared that symptoms of pain themselves must be objectively verified by medical evidence. In her regulation, the Secretary requires the individual claimant to draw a direct connection between his condition and the pain he suffers by showing that he is impaired by a "medical condition that could be *reasonably expected to produce those symptoms.*"

Eighth Circuit Law interpreting the Social Security Act explicitly states that such a connection need not be established. Whether or not the claimant's impairment should or should not produce disabling pain is simply not dispositive of the issue surrounding whether the claimant actually suffers from disabling pain. By requiring even a "reasonable" connection between the impairment and the claimant's symptoms of pain, the Secretary introduces into the evaluation an erroneous objective medical standard not required

under the law. Individual applicants must be taken as they are, complete with what may be their peculiar sensitivities to the pain which afflicts them.

Even if this court were to ignore a common sense reading of the Secretary's regulation, it would have to conclude that the Secretary is in fact applying her regulation in a manner contrary to Eighth Circuit law. Under Social Security Ruling 82-58,[*] the Secretary has made it even clearer that subjective complaints of pain will not be seriously considered unless established by objective medical evidence:

> Once . . . a medical condition (e.g. disc disease) is objectively established, the symptoms are still not controlling for purposes of evaluating disability. Clinical and laboratory data and well-documented medical history must establish findings which may reasonably account for the symptom in a particular impairment. Objective clinical findings which can be used to draw reasonable conclusions about the validity of the intensity and persistence of the symptom and about its effect on the individual's work capacity must be present. For example, in cases of back pain associated with disc disease, typical associated findings are muscle spasm, sensory loss, motor loss, and atrophy. *There must be an objective basis to support the overall evaluation of impairment severity.* (emphasis added).

Furthermore, in recent decisions the Secretary's Appeals Council has directly refused to follow the proper pain standard, even when specifically ordered to do so by a federal district court. In *Nickels v.*

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[*] Social Security Rulings are essentially policy statements issued by the Commissioner of Social Security.

Schweiker, No. 82-0265-CV-W-8 Slip op. (W.D. Mo. June 11, 1983), the district court found that the Secretary had failed to give sufficient consideration to plaintiff's subjective complaints of pain. The court then remanded the matter for further agency action, explicitly instructing the Secretary that she could not ignore subjective complaints of pain, "even if not supported by objective evidence." *Id.* at 13. When the matter reached the Appeals Council,[4] the Council decided to remand the case to an ALJ for further proceedings. On remand, the Council instructed the ALJ to follow "the procedures described in the Court's order of remand." However, the Appeals Council continued:

> [T]he administrative law judge is reminded that Social Security Administration Regulations 404.1529 and 426.929 and Ruling 82-58 direct that pain is a symptom, not an impairment. . . . A finding of disabled, therefore, must not be based on symptoms unless medical signs or findings show that there is a severe medical condition which could be reasonably expected to produce the symptoms and the degree of symptomatology alleged.

Likewise, the order of the district court was not followed in *Devore v. Heckler*, No. C 83-2040 (N.D. Ia. November 22, 1983). There, the district court ruled that an "ALJ may disbelieve a claimant's complaints of pain because of inherent inconsistencies or other circumstances, but not solely because they can-

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[4] The first step in the remand process from district court is to the Appeals Council. The Council may at that point either act upon the matter itself, or refer the case to an ALJ for further findings.

not show the exact physiological source of the pain." *Id.* at 3. The court then remanded the matter for further proceedings before the Secretary. The Appeals Council again remanded to an ALJ for further hearing, noting that the ALJ should follow the directions of the district court. The Appeals Council again, however, cited the ALJ to the Secretary's own erroneous regulations and rulings regarding pain, concluding that a disability "must not be based on symptoms unless medical signs or findings show that there is a severe medical condition which could be reasonably expected to produce the symptoms *and the degree of symptomology alleged.*"

Judge Heaney of the Eighth Circuit recently wrote of the Secretary's policy of disregarding the law of the courts:

> The SSA apparently has directed that decisions of both the district court and the courts of appeals should be ignored in deciding whether to grant or deny benefits to individual claimants. A memo to all ALJs dated January 7, 1982, from the Associate Commissioner of the Office of Hearings and Appeals, is typical of the Secretary's approach. The memo emphasized that the Deputy Assistant General Counsel "stressed the point that the federal courts do not run SSA's programs, and that the ALJs are responsible for applying the Secretary's policies and guidelines *regardless of court decisions below the level of the Supreme Court.*"

Heaney, *Why the High Rate of Reversals in Social Security Disability Cases?*, 7 Hamline Law Review 1, 9 (1984).

Thus, the Secretary apparently has decided to obey only the edicts of the U.S. Supreme Court. At the

same time, however, the Secretary refuses to appeal adverse rulings to the Supreme Court, thus depriving the Court of the opportunity to issue opinions on disputed issues and eliminating the Secretary's risk of being bound by a decision of the highest court in the land. Instead, the Secretary merely follows the ruling as to the individual claimant whose case was before a lower court, while ignoring general precedents set out by such courts. The Secretary therefore faces reversal on a case-by-case basis, but sees nothing to prevent her from ruling as she chooses in subsequent cases.

In her motion papers before this court, the Secretary even admits to her general policy of ignoring federal court decisions, while arguing simultaneously that she is following the law of this circuit:

> [C]onsiderations of inter-branch comity suggest that the Secretary should decline to follow court of appeals opinions only after *due and respectful consideration of such opinions.*

Defendant's Memorandum in Opposition to Plaintiff's Motions for Temporary Restraining Order and Preliminary Injunction, p. 14 n. 10.

Whether it be out of due and respectful consideration or bad faith, the Secretary has nonetheless breached her duties under the Social Security Act and the U.S. Constitution by not following the law of this circuit. By implementing her policy of nonacquiesence, whether it be by formal ruling or otherwise,[5]

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[5] The Secretary argues that she has not adopted a policy of nonacquiesence in this case because she has not issued a formal ruling nonacquescing in the orders of this circuit. The Secretary did in fact issue such a ruling regarding the Ninth Circuit's decision that the Secretary must follow the medical improvement standard in termination cases. *See Lopez v.*

the Secretary impairs the right of each individual to a proper consideration of his subjective complaint, including pain.

For these reasons, this court preliminarily concludes that the Secretary has applied an erroneous pain stanadrd on a system-wide basis, violating the Social Security Act, the due process clause of the Fifth Amendment and the constitutional doctrine of the separation of powers. Plaintiffs have more than sustained their burden of showing a likelihood of success on the merits on this issue.

The Medical Improvement Standard

Plaintiffs further argue that the Secretary has applied an erroneous standard when terminating benefits for individuals who had once been declared by the Secretary to be disabled. Plaintiffs claim that the Secretary is required under the Social Security Act to employ a "medical improvement standard", which would require the Secretary to show that an individual's medical condition has materially improved, or that there was a clear error in the initial decision, before terminating benefits. The Secreatry presently adheres to a "current disability" standard, which allows the Secretary to merely look at the present evidence of disability and make a new determination of whether or not an individual's disability has ceased.[8]

Heckler, 725 F.2d 1489 (9th Cir. 1984). This court finds such a distinction to be meaningless. Whether or not a formal ruling has been issued is irrelevant; the Secretary's policy of ignoring federal court decisions remains alive.

[8] The Secretary argues that at least in some cases "new" medical evidence is gathered in determining whether an individual's disability has ceased. Even if this is true in some cases, the Secretary still refuses to follow the medical improvement standard urged by plaintiffs to be the proper one.

The Secretary's "current disability" standard has been overwhelmingly rejected by the courts. *See, e.g., Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982); *Dotson v. Schweiker*, 719 F.2d 80 (4th Cir. 1983); *Kuzmin v. Schweiker*, 714 F.2d 1233 (3rd Cir. 1983); *Simpson v. Schweiker*, 691 F.2d 966 (11th Cir. 1982); *Weber v. Harris*, 640 F.2d 176 (8th Cir. 1981); *Graham v. Heckler*, 573 F.Supp. 1573 (W.Va. 1983); *Hyatt v. Heckler*, 579 F.Supp. 985 (N.C. 1984); *Doe v. Heckler*, 576 F.Supp. 463 (Md. 1983).

There is no doubt that under the Social Security Act, the claimant "bears a continuing burden of showing . . . that he has a physical or mental impairment," and that "[i]n order to remain eligible for benefits [he] must demonstrate that he is [disabled]." *Mathews v. Eldridge*, 424 U.S. 319, 336 and 343, 96 S.Ct. 893, 903 and 907, 47 L.Ed.2d 18 (1976). This rule does not prohibit, however, a presumption that an individual once disabled remains disabled absent proof that his condition has changed. *See Patti v. Schweiker, supra.* In *Patti*, the Ninth Circuit explained the reasoning for such a presumption in these cases:

> [A] prior ruling of disability can give rise to a presumption that the disability still exists. "Once evidence has been presented which supports a finding that a given condition exists, it is presumed in the absence of proof to the contrary that the condition has remained unchanged." *Rivas v. Weinberger*, 475 F.2d 255, 258 (5th Cir.1973). A presumption . . . impose[s] "on the party against whom it is directed the burden of going forward with the evidence to rebut or meet the presumption." Fed.R.Evid. 301.

> The Secretary's own regulations provide that the decision of an ALJ on a disability question becomes binding "on all parties to the hearing" if none of the specific avenues of review are exercised by the claimant or the Secretary. 20 C.F.R. § 416.1455 (1981).
>
> 669 F.2d at 586.

The Secretary's own regulations require that a final decision on the issue of disabilty is binding on both parties. The resulting presumption of continuing disability only requires the Secretary to come forward with evidence that the individual's condition has improved, and does not shift the ultimate burden of proof to the Secretary.

The difference between the medical improvement and current disabilities standards is of great importance to individual claimants. In *Lopez v. Heckler*, *supra*, the Ninth Circuit directed the Secretary to apply the medical improvement standard on a class-wide basis. Subsequently, the agency began a review of the cases of those individuals whose benefits had been terminated under the Secretary's improper current disability standard. Of these individuals, 73% were found to be disabled under this new and proper standard. In addition, the termination rate in Oregon, covered by the *Lopez* decision, has been reduced to only 12.3% compared to the national average of 45.2%. Affidavit of Elena H. Ackel, attorney in the *Lopez* case.

The Secretary argues that the medical improvement standard is too broad, and will allow individuals to remain on the rolls whose situation has improved due to new medical technology or drug treatment, but whose actual medical condition has remained unchanged. Clearly, the effect that such technology or treatment might have on the individual

could be taken into account in considering whether a person's medical condition has materially improved. New technology or treatment may in many cases alleviate the individual's impairment to the point that it is no longer disabling.

The Secretary's afguments along these lines confirm plaintiffs' position that the current standard in termination cases is not designed to merely take those individuals off the rolls who can now work. Rather, it has become clear that the Secretary's intentions have been to simply cut down the number of people receiving benefits.[7] This policy has been carried out at the expense of many people who have been previously found to be disabled and depend upon benefits for their daily needs. While the Secretary has been directed by Congress to carry out a disability review program, it has been carried out in a manner clearly contrary to law.

For these reasons, this court finds plaintiffs have shown substantial likelihood of success on the merits of their claims on this issue.

Irreparable Harm

The irreparable harm likely to befall plaintiffs if this preliminary injunction is not granted is immense. It is hard to envision a more urgent situation. Claimants who lose or are denied benefits face foreclosure proceedings on this homes, suffer utility cutoffs and find it difficult to purchase food. They go without medication and doctors' care; they lose their

[7] This court takes note that the ALJs themselves have filed suit in federal court to stop the Secretary from applying pressure to trim the disability rolls. *Association of Administrative Law Judges Inc. v. Schweiker*, Civil No. 83-01244 (D.D.C. filed Jan. 19, 1983).

medical insurance. They become increasingly anxious, depressed, despairing—all of which aggravates their medical conditions. They begin to think of suicide. They even die from the very disabilities the agency denies they have.

The following excerpts from plaintiffs' affidavits detail their compelling plight:

> Because I was not able to meet my utility costs in the winter of 82/83 my natural gas was shut off in May of 1983. Gas not only heats my house but also is the fuel needed for my cooking stove. I live in an older home with poor insulation and the house was quite chilly after the heat was turned off which aggravated the pain in my bones. I had only an electric hot plate to use for cooking . . . Many months I have had no money to pay for doctor's visits, prescription drugs or even over-the-counter pain relievers . . . Especially in the last year I have felt a great sense of isolation and frustration and have experienced moments of despair and wonderment at the futility of going on.

Affidavit of Harriet A. Miller, 61, Mora, Minn., suffering from spinal osteoporosis and arthritis.

> I cannot work because I suffer constant and severe pain, as a result of my degenerative disc disease . . . Our family has no medical coverage at this time . . . If a disc in my back were to slip out again—as had happened on six occasions while I was on disability benefits and Medicare —I would be fully responsible for the hospital bill, which would inevitably amount to several thousand dollars . . . These financial difficulties, the prospect of seeing my life savings dwindle

away, the constant severe pain, have caused me and my family considerable anxiety and distress. I have suffered, and continue to suffer from a prolonged depression as diagnosed by my psychiatrist. The loss of my income has created problems between me and my wife and has damaged our married life.

Affidavit of Donald Eugene Foster, 59, Maplewood, Minn., truck driver for 36 years.

I cannot work because of severe and constant pain in my back, due to arthritis and degenerative disc disease . . . The pain is so severe on some days that I cannot even get out of bed . . . Our house has twice gone into foreclosure proceedings and I have had to borrow from friends and relatives to save it.

Affidavit of George Hinrichs, 43, Minneapolis, Minn., Western Electric employee for 21 years.

My doctor told me to avoid stress, because otherwise I'd be more likely to have another heart attack. How can I avoid stress when I can't pay my bills or buy food for my family?

Affidavit of Arthur Gottsch, 43.

My father was originally found to be disabled . . . in January of 1975 . . . He continued to receive disability benefits until August of 1981, when his benefits were terminated. This occurred despite the fact that his problems with his eyesight seemed to have worsened, and he had also developed hypertension. He appealed the termination and he had a hearing before an Administrative Law Judge on April 15, 1982. The day after the hearing my father suffered a severe heart attack and was hospitalized in a

> coma. He died, without having regained consciousness, on June 2, 1982. In the meantime, having been notified of my father's condition, the Administrative Law Judge issued a favorable decision on May 20, 1982. Although I cannot draw a direct connection between my father's death and the loss of his Social Security benefits, such loss clearly did cause him additional strain and anguish, and it certainly was unjustified in light of the fact that his condition had worsened, not changed for the betther. I state these things in the hope that it may help others avoid similar hardship and loss.

Affidavit of Kim Ringold, daughter of Jack Jesperson, deceased.

This undeniable harm to plaintiffs convinces this court that the public interest demands immediate relief. This harm to plaintiffs also far outweighs any injury the Secretary might suffer as a result of the injunction. The Secretary points to bureaucratic woes and inconveniences in administering this order, but this cannot begin to compare with the health and welfare interests of the plaintiffs. The Secretary's alleged and speculative troubles pale even further in view of the fact that it was her own actions which brought the disability program to this juncture of crisis. Justice is only now catching up with her.

In sum, this court finds that plaintiffs have met all of the requirements for a preliminary injunction and now takes on the task of defining the terms of relief appropriate at this stage.

This court is fully cognizant of the deference that must ordinarily be displayed toward the Secretary when acting within her administrative domain. At the same time, however, this court recognizes its duty

to fashion equitable relief commensurate to the harm plaintiffs face. *Califano v. Yamasaki*, 442 U.S. 682, 704, 99 S.Ct. 2545, 2559, 61 L.Ed.2d 176 (1979).

The present circumstances mandate two types of preliminary relief. First, the Secretary must be ordered to employ the proper standards for pain and medical improvement. Second, class members whose benefits have been terminated must be entitled to have their benefits reinstated immediately pending a proper review of their cases, and class members whose initial applications for benefits have been denied under improper standards must be entitled to receive an expedited review of their claims.

Other courts facing similar situations involving the Secretary also have found it necessary to award reinstated benefits to terminated disability claimants. *See, e.g., Mental Health Association of Minnesota v. Heckler*, 720 F.2d 965 (8th Cir.1983); *Lopez v. Heckler*, 725 F.2d 1489 (9th Cir.1984). *Mental Health Association of Minnesota* involved a class-action challenge of the Secretary's procedures for evaluating disability claims of the severely mentally ill. The district court concluded that the plaintiffs were likely to prevail on the merits at trial and ordered the reinstatement of benefits. The Eighth Circuit affirmed, finding that the scope of the order was within the district court's jurisdiction:

> The district court merely reinstates certain plaintiffs to their former position; it does not extend a new benefit to those plaintiffs who merely had applied for benefits . . . The resultant order of reinstatement of benefits pending a proper adjudication is a restoration of the status quo.

Mental Health Association of Minnesota, 720 F.2d at 972-73.

Similarly, the present reinstatement order is merely a limited form of relief intended to preserve the status quo of terminated recipients. It does not pronounce that these class members will perpetually receive disability benefits, but only insists that benefits be paid until the Secretary properly reviews each claim on a case-by-case basis. Should the claimant ultimately be found ineligible, benefits paid out pursuant to the terms of the injunction could be recovered by the Secretary under the standard overpayment procedures of the Social Security Act. This order also does not provide to terminated claimants the past-due benefits which they may ultimately be entitled to. There is not the same urgency accompanying the award of past-due benefits as there is with reinstatement of current benefits, upon which plaintiffs rely for daily survival. Thus, back benefits will not be awarded until the Secretary evaluates and finds a continuing disability for each claimant or until this controversy is fully litigated.

The reasonableness of this reinstatement remedy is underscored by a recent action by the Secretary herself. On April 13, 1984, the Secretary announced a moratorium on certain terminations and, accompanying the moratorium, the reinstatement of benefits to some categories of terminated recipients. This indicates that the Secretary recognizes the harm suffered by persons whose benefits have been terminated.

This court realizes that some members of the class whose benefits have been terminated will be entitled to reinstatement under the Secretary's moratorium. There is much confusion, however, as to the exact terms and coverage of the moratorium. The Secretary herself has provided conflicting information, stating at one point that certain class members were

covered only to come back another day and recant. The Secretary also failed to comply with an order of this court to furnish more details on the moratorium. In fact, at the April 26 hearing—two weeks after the "alleged" moratorium—the Secretary still could not explain in any detail the parameters of her moratorium. The one fact that is clear is that many terminated claimants are definitely not covered by the moratorium. The moratorium does not provide for reinstated benefits to persons whose appeals are pending in district court (rather than in the agency), like Plaintiff Polaski, or to persons whose appeals have been remanded to the Secretary by a district court, like Plaintiff Blaschko. In addition, the moratorium will not reinstate benefits to persons whose benefits were terminated following a "diaried" as opposed to a "periodic" review. In order to provide effective relief, this court is left with no alternative but to proceed with this class intact with the understanding, of course, that no one would be entitled to a double payment of benefits.

Class members who have never been awarded disability benefits by the Secretary are not in as strong a position as terminated claimants to seek immediate benefits pursuant to this preliminary injunction. With these first-time applicants, there has never been an agency finding of disability. This court is nonetheless tempted to grant plaintiffs' request for the immediate payment of benefits, at least to claimants with pending district court appeals, because of the Secretary's persistent and obstinate refusal to abide by the law. The Secretary has had a multitude of opportunities to apply the proper standards to these class members, but has continually refused to do so. It is troublesome to contemplate that this again

might be the case if this court remands the claims of this segment of the class and again orders the Secretary to apply the proper law. Reluctantly, however, this court concludes that the Secretary should be given one last chance. The Secretary therefore is directed to evaluate under the proper standards the claims of these first-time applicants within the time periods specified below. Any claimant not receiving this individualized review in the mandated time will be entitled to immediate benefits.

This preliminary injunction includes within its terms of relief class members who have not pursued timely appeals. The fact that appeals were not filed in some cases is not an indication of how meritorious a case the claimants could present. Many claimants believe—after rounds of agency appeals—that further fighting would be futile. Others have been unable to retain attorneys. Affidavit of Arthur Gottsch. And some claimants may be so disabled that they could not perfect timely appeals.

The Secretary, through an affidavit submitted by Jean Hall Hinckley, Acting Deputy Associate Commissioner for Disability, implies that compliance with this order will be virtually impossible. According to Hinckley, it will take at least six months to merely identify "a substantial number" of class members. Hickley Affidavit, at p. 4. This court, in this age of computers, finds this assertion to be preposterous and frightening. Hinckley further states that the agency's problems will be compounded because it "is at present attempting to comply with a number of injunctive orders in major class action lawsuits nationwide." Hickley Affidavit, at p. 4. This only serves to illustrate, once again, that the Secretary herself has brought on many of the difficulties now

facing her. The fact that the magnitude of the Secretary's transgressions has been so overwhelming cannot stand as an argument for delaying remedial action. Instead, it further demonstrates the necessity for effective and immediate relief.

Accordingly, IT IS HEREBY ORDERED That a preliminary injunction be issued as to class members whose benefits have been or will be terminated and that the defendant, her employees, agents and assigns shall be:

1. Enjoined from terminating Title II or Title XVI benefits at any level of the administrative review process unless and until defendant has:

> a. Given timely and effective written notice to the recipient of disability benefits and his authorized representative, if any, of the proper pain and medical improvement standards and of the right to submit additional evidence; and
>
> b. Evaluated the recipient's continuing eligibility for disability benefits under the proper pain and medical improvement standards;

2. Enjoined from terminating disability payments to persons receiving continuing payments pursuant to Pub.L. 97-455 unless or until there has been an adverse decision by an Administrative Law Judge made in accordance with the requirements of paragraph 1, *supra*;

3. Ordered to notify all class members and their authorized representatives, if any, who are currently pursuing administrative or judicial appeals from the termination of their benefits and who are not currently receiving payments, of the proper pain and medical improvement standards, of the right to sub-

mit additional evidence, and of the right to reinstatement of payments.

These benefits shall continue until the Secretary determines, on a case-by-case basis and under the proper standards, that a claimant is not disabled.

For class members whose appeals are pending in district court and who choose reinstatement, their cases shall be remanded to the Secretary for this individualized review under the proper standards. The Secretary shall submit a notice of remand, along with a proposed order of remand, to the district court for each class member who requests reinstatement within 72 hours of claimant's request. These remands are intended to be administrative in nature, a procedural step to facilitate the transfer of cases from courts to the agency for compliance with this order. The Secretary's notice of remand shall state that the remand is being sought pursuant to the claimant's request and this court's injunction, and that immediate court action is requested.

4. Ordered to notify all class members and their authorized representatives, if any, who do not have timely administrative appeals pending of the proper pain and medical improvement standards, the right to have their claims reopened, the right to submit additional evidence, and the right to have payments reinstated;

5. Ordered to reopen the claims of class members whose files are located at the District Offices or at the Appeals Council and to return these files to the DDS for reevaluation under the proper pain and medical improvement standards, whether or not the claimant seeks reinstatement of payments pursuant to paragraph 4, *supra*;

6. It is further ordered that both parties shall submit to the court within five days of the date of

this order proposed notices to be sent by the Secretary to class members pursuant to the terms of this order. This notice shall include information concerning the availability of attorneys under the Social Security Act to assist claimants in their efforts to gain benefits. The Secretary shall mail such notices to class members within fifteen days of the court's approval of the forms. Class members shall be given thirty days to respond to such notices. Except for class members with appeals pending in district courts, the Secretary shall begin paying benefits to any class members requesting reinstatement within fifteen days of the request for reinstatement. For claimants with pending district court appeals, the Secretary shall begin paying benefits to any class members requesting reinstatement within fifteen days of the filing of the district court's remand order.

IT IS FURTHER ORDERED That a preliminary injunction be issued as to class members whose applications have been or will be denied as follows:

1. The the Secretary is ordered to issue a teletype within twenty-four hours of the date of this order notifying all offices of the Social Security Administration to process applications for Title II and Title XVI disability benefits, under the proper pain standard, and to notify the claimant of the proper pain standard if the application is denied;

2. That all class members whose applications have been denied by the defendant at any level of the administrative review process with no appeal pending, or who currently have an administrative appeal pending,

a. Shall be issued a written notice (with a copy to his legal representative, if any) by the Secretary which contains the following:

i. Asks the applicant whether he alleges he is unable to work in whole or in part because of pain or other subjective complaints;

ii. Informs the applicant of the proper pain standard;

iii. With respect to applicants who do not have a timely appeal pending, states that the applicant has a right, if he so chooses, to have his claim reopened and considered under the proper pain standard, to submit additional evidence, to an expedited decision on his application within a stated time period, and to interim benefits if the Secretary fails to issue a decision within the stated time period;

iv. With respect to applicants who currently have an administrative appeal pending, states that the applicant has a right, if he so chooses, to have his claim considered under the proper pain standard, to submit additional evidence, to an expedited decision on his application within a stated time period, and to interim benefits if the defendant fails to issue a decision within the stated time period.

b. Upon receiving the timely written request from an applicant for an expedited decision, the Secretary shall consider the application under the proper pain standard and shall issue a written decision within the stated time period:

i. For those persons whose applications are pending and/or will be considered at the initial application or the Reconsideration

Level, the stated time period shall be sixty days from the date of receipt of the request for an expedited decision.

ii. For those persons whose applications are pending and/or will be considered at the Administrative Law Judge or Appeals Council level, the stated time period shall be ninety days from receipt of the request for an expedited decision.

c. In those cases in which the defendant has not issued an expedited decision within the stated time period, the Secretary shall commence paying current monthly interim benefits to the applicant from the date the stated time period has expired, and shall continue to pay such benefits until a written decision is issued.

3. That the Secretary shall reopen the claims of class members whose files are located at the District Offices or at the Appeals Council whether or not the claimant responds to the notice referred to in paragraph 2(a)(iii), *supra*. The files located at the District Offices shall be returned to the DDS for evaluation under the proper pain standard, and the files located at the Appeals Council shall be returned to the Office of Hearings and Appeals for evaluation under the proper pain standard.

4. That all class members whose applications have been denied in a final decision by the Secretary and who have requested review by a federal district court,

a. Shall be issued a written notice (with a copy to his legal representative if any) by the Secretary which contains the following:

i. Asks the applicant whether he alleges he is unable to work in whole or in part be-

cause of pain or other subjective complaints;

ii. Informs the applicant of the proper pain standard,

iii. States that the applicant has a right, if he so chooses, to have his claim remanded to the Secretary to be considered under the proper pain standard, to submit additional evidence, to an expedited decision on his application within a stated time period, and to interim benefits if the defendant fails to issue a decision within the stated time period.

iv. Within 72 hours of an applicant's request to have his claim remanded, the Secretary shall submit a notice of remand, along with a proposed order, to the district court. These remands are intended to be administrative in nature, a procedural step to facilitate the transfer of cases from courts to the agency for compliance with this order. The Secretary's notice of remand shall state that the remand is being sought pursuant to the claimant's request and this court's injunction, and that immediate court action is requested.

b. Upon receiving the timely written request from an applicant for an expedited decision, the Secretary shall consider the application under the proper pain standard and shall issue a written decision within thirty days from the date of the filing of the district court's remand order. In those cases in which the defendant has not

> issued an expedited decision within the stated time period of thirty days, the Secretary shall commence paying current monthly interim benefits to the applicant from the date the stated time period has expired, and shall continue to pay such benefits until a written decision is issued.

5. Both parties shall submit to the court within five days of the date of this order proposed form notices to be sent by the Secretary to class members pursuant to the terms of this order. This notice shall include information concerning the availability of attorneys under the Social Security Act to assist claimants in their efforts to gain benefits. The Secretary shall mail such notices to class members within fifteen days of the court's approval of the forms. Class members shall be given thirty days to respond to such notices.

IT IS FURTHER ORDERED That as used herein, the "proper medical improvement standard" is as follows:

> Disability may be found to have ceased for medical reasons when there is material improvement in the individual's medical condition, or there was clear and specific error.
>
> Material improvement means that, since the most recent decision, the medically determinable physical or mental impairment(s) which prevented the person from doing substantial gainful activity and entitled him/her to disability benefits has decreased to the point that the person can now perform substantial gainful activity. This improvement must be demonstrated by

medical evidence consisting of signs, symptoms and laboratory findings and must show that either:

a. the impairment(s) itself has decerased, or

b. the effect of the impairment(s) on the person has decreased (for example through drug therapy; however, any negative effects, such as a drug reaction, must be considered).

Clear and specific error means the determination allowing or continuing disability was plainly incorrect; e.g. evidence belonged to another individual, evidence was incorrectly reported or obviously misread. A difference in judgment on a case does not constitute clear and specific error.

IT IS FURTHER ORDERED That as used herein, the "proper pain standard" is as follows:

Disability may be found to exist when there is a medically determinable physical and mental impairment which provides an underlying basis for allegations of pain and other subjective complaints even if there is no objective evidence which explains or supports the degree or severity of the claimant's pain or other subjective complaints.

IT IS FURTHER ORDERED That plaintiffs' motion for a revised class certification is hereby granted.

IT IS FURTHER ORDERED That defendant's motion for a reconsideration of this court's April 17 order is hereby denied.

IT IS FURTHER ORDERED That defendant's motion for summary judgment is hereby denied.

IT IS FURTHER ORDERED That defendant shall furnish a complete copy of this opinion to all of her agents and personnel who will in any capacity act upon this order.

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-84-64

LORRAINE POLASKI, ET AL., PLAINTIFFS,

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

[Filed Apr. 11, 1985]

Based on all the files, records and proceedings herein it is ORDERED:

1. That the individual claim of named plaintiff Lorraine Polaski (SSN 476-30-8652) for a continuation of disability insurance benefits under Title II of the Social Security Act is hereby remanded to the Secretary of Health and Human Services for further proceedings consistent with the Disability Benefits Reform Act of 1984; and

2. That this Court shall retain jurisdiction over the class claims which remain at issue in this lawsuit in a manner consistent with the decision of the Eighth Circuit of Appeals in *Polanski v. Heckler*, 751 F.2d 943 (8th Cir. 1984).

Dated: April 10, 1985

BY THE COURT:

/s/ MILES W. LORD
Judge of District Court

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-84-64

LORRAINE POLASKI, ET AL., PLAINTIFFS,

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

April 12, 1985

ORDER

MILES W. LORD, Chief Judge.

This matter comes before the court upon the order of remand issued by the United States Court of Appeals for the Eighth Circuit, *Polaski v. Heckler*, 751 F.2d 943 (1984) remanding 585 F.Supp. 1004. In that opinion, the Court of Appeals dismissed plaintiffs' class action concerning the Secretary's termination of disability benefits, but upheld this court's order in favor of plaintiffs whose applications for benefits had been denied because of the Secretary's misapplication of agency regulations concerning proof of pain and other subjective complaints. In compliance with the Eighth Circuit's order, therefore,

IT IS HEREBY ORDERED

1. That the class members who are entitled to the relief described herein include:

all persons (1) residing in Minnesota, North Dakota, South Dakota, Nebraska, Iowa or Arkansas, (2) who have applied for Title II or Title XVI benefits, (3) who allege that they are unable to work in whole or in part as a result of pain or other subjective complaints, and (4) who have received an adverse administrative decision on their claims for benefits as described below:

a) in Minnesota, North Dakota, South Dakota, and Nebraska, those persons who received an adverse decision on their claims, at any level of the administrative review process, between January 30, 1984 and July 17, 1984, inclusive;

b) in Arkansas, those persons who received an adverse decision on their claims at the Administrative Law Judge or Appeals Council levels between February 20, 1984 and July 17, 1984, inclusive;

c) in Iowa, those persons who received an adverse decision on their claims at any level of the administrative review process between November 26, 1983 and July 17, 1984, inclusive;

2. That, within a reasonable time, the Secretary shall issue the attached written notice to each class member with a copy to his or her legal representative, if any, which:

a) informs each class member of the proper standard for the administrative appraisal of allegations of pain or other subjective complaints;

b) asks each class member whether he or she alleges an inability to work, in whole or in part, because of pain or other subjective complaints;

c) states that each class member has the option and the right to have his or her claim reconsidered under the proper pain standard;

d) informs each class member that the request for reconsideration must be submitted within time limits established by the Secretary;

e) informs each class member of his or her right to submit additional evidence within time limits established by the Secretary;

f) contains information concerning the availability under the Social Security Act of attorneys to assist claimants in their efforts to obtain disability benefits.

3. That upon receiving a written request for reconsideration, the Secretary shall consider the application under the proper pain standard, and shall issue a written decision within a reasonable time;

4. That the claims of class member who request reconsideration shall be evaluated by the Disability Determination Services in their respective states. The decision of the Disability Determination Services upon reconsideration shall be regarded as a new decision and shall be subject to the regular appeals procedures of agency adjudication.

5. That the Secretary shall timely provide to the court and plaintiffs' counsel copies of the Secretary's teletype transmitting the notice and instructing adjudicative components of the Social Security Administration as to its proper use. Further, the Secretary shall prepare and maintain monthly statistical reports showing the number of people notified and the number of people responding to the notices. The Secretary shall timely provide to the court and plaintiffs' counsel copies of these reports.

6. That as used herein, the "proper pain standard" is as follows:

A claimant has the burden of proving the disability results from a medically determinable physical or mental impairment. Symptoms such as pain, short-

ness of breath, weakness, or nervousness are the individual's own perceptions of the effects of a physical or mental impairment(s). Because of their subjective characteristics and the absence of any reliable techniques for measurement, symptoms (especially pain) are difficult to prove, disprove, or quantify. As a result of this difficulty, some adjudicators have misinterpreted the Secretary's policies as enunciated in SSR-82-58.

In particular, some adjudicators may have misinterpreted Example No. 2 in SSR-82-58 to allow allegations of pain to be disregarded solely because the allegations are not fully corroborated by objective medical findings typically associated with pain. The example should not be construed to be inconsistent with the text of SSR-82-58 which states in part:

> The effects of symptoms must be considered in terms of any additional physical or mental restrictions. They may impose beyond those clearly demonstrated by the objective physical manifestations of disorders. Symptoms can sometimes suggest a greater severity of impairment than is demonstrated by objective and medical findings alone.
>
> While the claimant has the burden of proving that the disability results from a medically determinable physical or mental impairment, direct medical evidence of the cause and effect relationship between the impairment and the degree of claimant's subjective complaints need not be produced. The adjudicator may not disregard a claimant's subjective complaints solely because the objective medical evidence does not fully support them.
>
> The absence of an objective medical basis which supports the degree of severity of subjective

complaints alleged is just one factor to be considered in evaluating the credibility of the testimony and complaints. The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:

1. the claimant's daily activities;
2. the duration, frequency and intensity of the pain;
3. precipitating and aggravating factors;
4. dosage, effectiveness and side effects of medication;
5. functional restrictions.

The adjudicator is not free to accept or reject the claimant's subjective complaints *solely* on the basis of personal observations. Subjective complaints may be discounted if there are inconsistencies in the evidence as a whole.

7. That the Secretary shall send to class members and their representatives, if any, copies of the notice in the form appended hereto.

APPENDIX

NOTICE

Our records show that you might be able to receive disability benefits because of a recent court case about the Social Security law. In *Polaski v. Heckler*, the United States Court of Appeals for the Eighth Circuit ruled that we, the Social Security Administration, may have used the wrong legal standard for considering the pain or other subjective complaints of people who have applied for disability benefits. By the term "other subjective com-

plaints", we mean things like numbness, dizziness, nervousness, and other problems that do not show up in x-rays, blood test, or the like.

The court ordered us to consider pain or other subjective complaints under the "pain standard" (copy enclosed) when we are deciding whether people who apply for disability benefits are disabled. Under the "pain standard", people can be found eligible for disability benefits, even though objective medical evidence may not entirely support the applicant's claim of disability caused by pain or other subjective complaints.

IMPORTANT RIGHTS

You applied for disability benefits and your application was denied. You now have the chance to renew your application. If you claim that you are unable to work either solely or partly because of pain or some other subjective complaint, you have the right to have your claim considered under the "pain standard." Our new consideration of your claim under the "pain standard" might result in an award of disability benefits to you. You will also have the chance to present new evidence to prove that you are disabled.

If you request reconsideration, your claim will be evaluated by the Disability Determination Service in your state. The decision on reconsideration will be a new decision, and you will have the right to file an appeal if you don't agree with it.

You have the right to represent yourself in any new proceedings, or to be represented by an attorney or any other qualified person. Contact your local Social Security office or legal services program for the names of the organizations or individuals who can help you.

WHAT YOU MUST DO

If you want us to reconsider your claim for disability benefits, you must return the attached request form to us within 30 days of the date you receive this notice. We will not review your case unless you ask us to do so. If you wish to present new evidence of your condition, be sure to check off the blank on the enclosed return form. You will have 60 days from your receipt of this notice in which to send us new evidence.

PAIN STANDARD

While the claimant has the burden of proving that the disability results from a medically determinable physical or mental impairment, direct medical evidence of the cause and effect relationship between the impairment and the degree of claimant's subjective complaints need not be produced. The adjudicator may not disregard a claimant's subjective complaint solely because the objective medical evidence does not fully support them.

The absence of an objective medical basis which supports the degree of severity of subjective complaints alleged is just one factor to be considered in evaluating the credibility of the testimony and complaints. The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as

1. the claimant's daily activities;
2. the duration, frequency and intensity of the pain;
3. precipitating and aggravating factors;
4. dosage, effectiveness and side effects of medication;
5. functional restrictions.

The adjudicator is not free to accept or reject the claimant's subjective complaints *solely* on the basis of personal observations. Subjective complaints may be discounted if there are inconsistencies in the evidence as a whole.

REQUEST FORM

I believe that I am unable to work in whole or in part because of pain or some other subjective complaint. I would like the Social Security Administration to reconsider my application for disability benefits using the correct pain standard.

Check One:

____ I wish to submit additional evidence.

____ I do not wish to submit additional evidence.

Date: _____ Name: _____

Social Security No.: _____

REMEMBER, IF YOU WANT US TO RECONSIDER YOUR CLAIMS, YOU MUST RETURN THIS FORM TO US WITHIN 30 DAYS. ANY ADDITIONAL EVIDENCE MUST BE SUBMITTED WITHIN 60 DAYS.

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-83-233

PATRICK J. BLASCHKO, PLAINTIFF,

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

[Filed Mar. 9, 1984]

ORDER

Based upon the Report and Recommendation of Magistrate Floyd E. Boline, and a review of the files and records here,

IT IS HEREBY ORDERED that this case is remanded to the Secretary for further action in accordance with said Report and Recommendation.

Date: March 7, 1984

/s/ DIANA E. MURPHY
Judge Diana E. Murphy
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-83-233

PATRICK J. BLASCHKO, PLAINTIFF,

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

PAUL ONKKA, ESQ., SOUTHERN MINNESOTA REGIONAL LEGAL SERVICES, INC., FIFTH & OAK STREETS, CARVER, MN 55315, APPEARS FOR PLAINTIFF;

v.

ROBERT M. SMALL, ASSISTANT UNITED STATES ATTORNEY, 234 FEDERAL BUILDING, MINNEAPOLIS, MN 55401, APPEARS FOR DEFENDANT.

REPORT AND RECOMMENDATION

Plaintiff appeals the Secretary's final decision that he is no longer entitled to disability insurance benefits and Supplemental Security Income under §§ 216(i), 223 and Title XVI of the Social Security Act, 42 U.S.C. §§ 416(i), 423 and 1381 *et seq.* This Court has jurisdiction to review the Secretary's final decision under § 205(g) of the Act, 42 U.S.C. § 405(g).

Plaintiffs applied for benefits in October 1975, claiming that he became unable to work as of June 1975 because of

a heart condition.[1] He was granted disability benefits. In August 1981, plaintiff received a termination notice advising him that recent medical evidence showed he had regained the ability to work as of July 1981. This decision was affirmed on reconsideration in February 1982. Plaintiff disagreed with the result and an administrative appeal hearing was held at his request on June 3, 1982. The Administrative Law Judge (ALJ) found that although plaintiff's heart condition still prevents him from returning to his old job as a truck driver, he has regained the ability to perform sedentary work. (T. 17) The Appeals Council approved the ALJ's decision, making it the final decision of the Secretary.

Both parties have filed summary judgment motions. The issue on appeal is whether the Secretary's decision is supported by substantial evidence. After reviewing the record, this Court concludes that it is not, and recommends that the matter be remanded for further consideration in accordance with this opinion.

The medical records show that plaintiff was evaluated for heart burn and chest pain in the summer of 1975 and was diagnosed as suffering from coronary heart disease. (T. 168-174) Coronary angiograms done in October 1975 revealed the need for surgery, and in February 1976 plaintiff underwent a two-vessel bypass operation. (T. 134, 148) Since his operation, plaintiff has continued to have nonradiating chest pain upon physical exertion. The condition has been diagnosed as "chronic stable angina". (T. 111) Plaintiff's angina is relieved by resting for ten minutes or by taking nitroglycerin. (T. 152, 155-55, 158)

The records also show that plaintiff suffers from leg pain when he exerts himself. In January 1982, Doppler ultrasound studies of plaintiff's "peripheral arterial cir-

---

[1] Plaintiff now also claims that low back pain prevents him from working. However, by plaintiff's own admission, he has never been treated for this condition. (T. 52)

culation . . . in the lower extremities" were performed. (T. 177). The results showed "abnormal Doppler ultrasound pressure studies in the left lower extremity indicating mild atherosclerotic obliterans." (T. 178)

Plaintiff testified that his chest and leg pain prevents him from performing household tasks, walking long distances and lifting more than ten pounds. He testified that he takes three short naps a day and must lie down for 15 minutes whenever he has an angina attack. Finally, plaintiff stated that the medicine he takes has affected his ability to concentrate and remember.

Plaintiff has the burden of showing that his disability continues and that he remains entitled to benefits. *Weber v. Harris*, 640 F.2d 176, 177 (8th Cir. 1981). Plaintiff met his burden when he showed he was unable to return to his old job. *Nelson v. Heckler*, 712 F.2d 346 (8th Cir. 1983). The burden shifted to the Secretary to show that other jobs existed which plaintiff could perform. *Id.*

In attempting to discharge his burden, the ALJ relied exclusively on the Medical-Vocational Guidelines, 20 C.F.R. Part 404, Subpart P, Appendix 2 to determine that plaintiff could perform sedentary work. The ALJ apparently relied exclusively on the Guidelines because, although he did not discredit plaintiff's subjective complaints of pain, he refused to consider them because they were unsupported by objective medical evidence. (T. 15) However, this circuit has repeatedly held that the ALJ must give serious consideration to a claimant's allegations of pain, and may not reject them solely because they are unsupported by the medical evidence. *Simonson v. Schweiker*, 699 F.2d 426, 429 (8th Cir. 1983). Moreover, a fair reading of record indicates that plaintiff's complaints of chest pain are fully supported by the medical evidence. (T. 152-168) The ALJ's exclusive reliance on the

Guidelines was therefore error, because the Guidelines only take into account a claimant's exertional limitations. *McCoy v. Schweiker*, 683 F.2d 1138, 1148 (8th Cir. 1982).

On remand, the ALJ has the burden of showing that there are other jobs plaintiff can perform despite his pain. To discharge his burden, the ALJ must consult a vocational expert. The hypothetical posed to the expert should include a complete description of plaintiff's pain, and may not contain any ultimate conclusion about plaintiff's ability to perform in a particular work category. *Simonson, supra.*

It is therefore recommended that this case be remanded for further consideration in accordance with this opinion.

Date: February 2, 1984

FLOYD E. BOLINE
United States Magistrate

Pursuant to Local Rule 14C(b) any party may object to this Report and Recommendation by filing with the Clerk of Court and serving all parties within ten days, a writing which specifically identifies those portions of this Report to which objections are made and the basis of that objection. Failure to comply with this procedure shall operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

APPENDIX J

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

September Term, 1984

No. 84-5085MN

LORRAINE POLASKI, ET AL., APPELLEES

v.

MARGARET M. HECKLER, ETC., APPELLANT

[Filed Dec. 31, 1984]

Appeal from the United States District Court
for the District of Minnesota

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties and was argued by counsel.

Upon consideration of the premises it is hereby ordered and adjudged that the cause is remanded to the district court with directions for further proceedings consistent with the opinion of this Court.

December 31, 1984

APPENDIX K

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

September Term, 1984

No. 84-5085-MN.

LORRAINE POLASKI, ET AL., APPELLEES

v.

MARGARET M. HECKLER, ETC., APPELLANT

Appeal from the United States District Court
for the District of Minnesota

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

Judge Donald R. Ross would have granted the petition.

April 16, 1985

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1984

No. 84-5085-MN.

LORRAINE POLASKI, ET AL., APPELLEES

v.

MARGARET M. HECKLER, ETC., APPELLANT

Appeal from the United States District Court
for the District of Minnesota

AMENDED ORDER

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

Judges Donald R. Ross, John R. Gibson and Pasco M. Bowman would have granted the petition.

April 19, 1985

APPENDIX M

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides:

> Judicial review
>
> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this

section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

2. Section 3 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1799, provides:

EVALUATION OF PAIN

(a)(1) Section 223(d)(5) of the Social Security Act is amended by inserting after the first sentence the following new sentences: "An individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished under this paragraph (including statements of the individual or his physician as to the intensity and persistence of such pain or other symptoms which may reasonably be accepted as consistent with the medical signs and findings), would lead to a conclusion that the individual is under a disability. Objective medical evidence of pain or other symptoms established by medically acceptable clinical or laboratory techniques (for example, deteriorating nerve or muscle tissue) must be considered in reaching a conclusion as to whether the individual is under a disability.".

(2) Section 1614(a)(3)(H) of such Act (as added by section 8 of this Act) is amended by striking out "section 221(h)" and inserting in lieu thereof "sections 221(h) and 223(d)(5)".

(3) The amendments made by paragraphs (1) and (2) shall apply to determinations made prior to January 1, 1987.

(b)(1) The Secretary of Health and Human Services shall appoint a Commission on the Evaluation of Pain (hereafter in this section referred to as the "Commission") to conduct a study concerning the evaluation of pain in determining under titles II and XVI of the Social Security Act whether an individual is under a disability. Such study shall be conducted in consultation with the National Academy of Sciences.

(2) The Commission shall consist of at least twelve experts, including a significant representation from the field of medicine who are involved in the study of pain, and representation from the fields of law, administration of disability insurance programs, and other appropriate fields of expertise.

(3) The Commission shall be appointed by the Secretary of Health and Human Services (without regard to the requirements of the Federal Advisory Committee Act) within 60 days after the date of the enactment of this Act. The Secretary shall from time to time appoint one of the members to serve as Chairman. The Commission shall meet as often as the Secretary deems necessary.

(4) Members of the Commission shall be appointed without regard to the provisions of title 5, United States Code, governing appointments in the competitive service. Members who are not employees of the United States, while attending meetings of the Commission or otherwise serving on the business of the Commission, shall be paid at a rate equal to the per diem equivalent of the

rate provided for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day, including traveltime, during which they are engaged in the actual performance of duties vested in the Commission. While engaged in the performance of such duties away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

(5) The Commission may engage such technical assistance from individuals skilled in medical and other aspects of pain as may be necessary to carry out its functions. The Secretary shall make available to the Commission such secretarial, clerical, and other assistance and any pertinent data prepared by the Department of Health and Human Services as the Commission may require to carry out its functions.

(6) The Secretary shall submit the results of the study under paragraph (1), together with any recommendations, to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate not later than December 31, 1985. The Commission shall terminate at the time such results are submitted.

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No.86-1617

Supreme Court, U.S.
FILED
MAY 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

October Term, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

vs.

LORRAINE POLASKI, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court Of Appeals For the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

This case is an Eighth Circuit-wide class action brought under 42 U.S.C. §405(g) to challenge the Secretary's former policy for evaluating pain in determining eligibility for disability benefits under the Social Security Act. On appeal, the Secretary agreed to follow the law of the Circuit respecting the evaluation of pain, and that agreement permitted resolution of the case as to most members of the plaintiff class.

The only question presented to the Court at this stage in the litigation is whether the court of appeals erred in waiving the exhaustion requirement for a small subclass (some 600-900) of claimants for

disability benefits, when (a) in determining the eligibility of these (and other) class members, the Secretary had applied an unlawful policy which was at variance with the procedures the Secretary himself should apply and which irreparably injured the members of the class, and (b) all such persons afforded relief had live claims pending at the time the class claims were filed.

PARTIES TO THIS PROCEEDING

The scope of the class is much narrower than that set forth in the Petition. Pet. II-III. The portion of the class which retains an interest in the petition for certiorari excludes (1) persons whose benefits were terminated, App. 11a (dismissing claims), (2) persons who have been evaluated subsequently under lawful standards, App. 25a (persons decided since July 17, 1984 re-decided under proper standard), and (3) residents of Missouri, who are subject to a separate suit. App. 55a (excluding members of other certified class actions). The portion of the class affected by the petition for certiorari includes only the following, App. 54a-55a, 87a:

A. Persons whose applications for Title II and/or Title XVI disability benefits were denied on medical or medical/vocational grounds within the following time periods:

1) in Minnesota, North Dakota, South Dakota and Nebraska, those persons who received an adverse decision between January 30, 1984 and July 16,[1] 1984;

2) in Arkansas, those persons who received an adverse decision at the ALJ or Appeals Council levels between February 20, 1984, and July 16, 1984; and

---

[1] The court of appeals limited the class period to July 16, 1984.

3) in Iowa, those persons who received an adverse decision between November 26, 1983[2/] and July 16, 1984; and

B. Who alleged they were unable to work in whole or in part because of pain or other subjective complaints; and

C. Whose claims were not readjudicated subsequent to July 16, 1984.

[2/] The earlier date for Iowa is based on an earlier-filed state-wide class action. App. 53a. For those claimants, §405(g)'s 60-day period extends back an additional two months.

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No. 86-1617

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

Otis R. Bowen, Secretary of Health and Human Services, Petitioner,

v.

Lorraine Polaski, et al., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

Petitioner's statement omits the March 1, 1985 order of the court of appeals, finding that the position of the Secretary with respect to the former pain standard was not substantially justified

under 28 U.S.C. §2412(d)(1)(A). Resp. App. 1ra-5ra.

STATEMENT OF THE CASE

The petition seeks review of the judgment of the court of appeals, which partially affirmed a preliminary injunction directing the Secretary to provide notice relief to class members whose claims of disabling pain had been decided under an illegal policy. Both the district court and the court of appeals found that a systematic procedural irregularity had inflicted irreparable harm on the class. The illegal policy denied claimants the individualized consideration which the law requires and precipitated a constitutional confrontation between the Secretary and the courts.

The notice relief ordered by the court of appeals requires neither timetables nor payment of benefits to persons who are not disabled. The order will result in the reopening of some 600 to 900 claims for re-evaluation and the mooting of the constitutional conflict. The class members whose claims will be reopened all had live and non-time barred claims when the class claims here, and in the predecessor Iowa class action raising identical issues, were filed.

A. The District Court Proceedings as to the Pain Issue.

On April 3, 1984 respondent Polaski moved the district court to amend her complaint seeking reversal of the Secretary's denial of disability benefits. The amended complaint sought class-wide relief

in order to resolve and end the on-going furor within the Eighth Circuit concerning the Secretary's policy for evaluating pain. App. 5a, 50a, 58a-59a.

Polaski sought relief on behalf of a narrowly defined class which included only those persons who fell within the short sixty-day statute of limitations specified by 42 U.S.C. §405(g).[3/] Class respondents sought to resolve this on-going controversy in the most expeditious manner possible. They sought: (1) a temporary restraining order to preserve the status quo, i.e., an order halting the continuing issuance of decisions under assertedly illegal standards; and (2) a

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3/ The sixty-day period has been extended by five days pursuant to the Secretary's regulation, allowing additional time for mail. 20 C.F.R. §§404.901, 416.1401.

preliminary injunction to require adjudication of cases under lawful standards.

On April 17, 1984, the district court granted respondents' request for a temporary restraining order. App. 40a, 47a. The district court promptly set the matter for hearing on the motion for a preliminary injunction. In the nine (9) days that elapsed from the court's order allowing amendment of the complaint to the hearing on the motion for a preliminary injunction, the parties did not engage in discovery. The preliminary injunction motion was submitted to the district court on affidavits and on the briefs and arguments of counsel.

A central question the preliminary injunction motion presented was whether the Secretary had adopted a practice that

allegations of pain should be disregarded unless they were fully corroborated by the objective medical evidence, i.e., unless the claimant could establish a cause and effect relationship between the objective evidence and the degree of symptomatology which he experienced. App. 56a-57a. The Secretary asserted that such a policy did not exist and that he was following Eighth Circuit law, which requires careful and individualized evaluation of each claim. The Secretary stressed that his regulation, 20 C.F.R. §404.1529, required only a "reasonable" relationship between objective findings and symptoms. App. 58a-60a.

The district court found against the Secretary on this issue. It concluded the Secretary did in fact require claimants to establish not only the

presence of symptoms, but also the severity of the symptoms, through objective medical evidence. This conclusion was based in part upon a detailed analysis of Social Security Ruling 82-58. App. 61a. The holdings of the district courts and the court of appeals in case after case provided further support. App. 56a-59a. Those cases involved appeals from decisions of the ALJs or Appeals Council, the point at which the Secretary had applied his expertise to assure that his policies were uniformly and correctly

applied. [4] The reported cases evidenced the Secretary's systematic requirement that subjective complaints be fully corroborated by objective medical evidence.

In addition, the affidavit evidence included two cases which had been remanded from district court. In each case the Appeals Council, using apparently boilerplate language, required that the ALJ not

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[4] The Solicitor General has described the function of the Appeals Council as follows:

"The ALJ and Appeals Council stages . . .furnish the Secretary with her principal opportunity to apply her expertise and correct errors by the state agency. . . .

"Centralized review by the Appeals Council in turn serves to ensure that the complex statutory and regulatory provisions are correctly and uniformly applied by the approximately 800 ALJs." Brief for the Petitioners, at 13-14, 31, Heckler v. City of New York, No. 84-1923.

find a disability unless the medical signs and findings supported both the symptoms "and the degree of symptomatology alleged." App. 61a-63a.

Based on the affidavit record, the district court also found that the class was suffering irreparable harm as a result of the Secretary's policy. The district court found:

> It is hard to envision a more urgent situation. Claimants who lose or are denied benefits face foreclosure proceedings on their homes, suffer utility cutoffs and find it difficult to purchase food. They go without medication and doctors' care; they lose their medical insurance. They become increasingly anxious, depressed, despairing - all of which aggravates their medical conditions. They begin to think of suicide. They even die from the very disabilities the agency denies they have. App. 68a-69a.

Based on the evidence adduced, the ongoing tide of reversals in the courts, App. 50a, and the Secretary's avowed policy of non-acquiescence, App. 63a-65a, on April 27, 1984 the trial court entered a preliminary injunction. Although it criticized them, App. 59a-61a, the district court did not invalidate either the regulation or the Social Security Ruling. The district court did make a preliminary finding that, notwithstanding the Secretary's denials, a standard contrary to the requirements of Eighth Circuit law and of the Social Security Act was being applied within the circuit. App. 65a.

B. The Court of Appeals Proceedings as to the Pain Issue.

On appeal and at the urging of the court, App. 31a, the parties entered into a settlement concerning the standard for evaluating pain in the Eighth Circuit, a standard which the Secretary concedes reflects the proper method for evaluating pain under the Act. App. 16a-17a. Significantly, that standard, agreed to by the parties, includes the following language which is directly contrary to the directives which the Appeals Council had been issuing to ALJs within the circuit:

> . . .direct medical evidence of the cause and effect relationship between the impairment and the degree of claimant's subjective complaints need not be produced. The adjudicator may not disregard a claimant's subjective complaints solely because the

> **objective medical evidence does not fully support them.**

App. 14a.

The Eighth Circuit initially approved the settlement as a correct statement of the law and directed the Secretary to continue to adhere to those standards in adjudicating cases within the Eighth Circuit. App. 20a, 30a-34a.

Following the parties' agreement on the pain standard to be applied, the court of appeals issued its decision on December 31, 1984. After disposing of both the medical improvement issues and the prospective pain issues, App. 8a-21a, the court turned to the matters which are now raised in the petition for certiorari. This, the most critical portion of the decision

below, App. 21a-27a, the Secretary largely ignores.[5/]

The district court's preliminary injunction order had been based on findings of irreparable harm and of an unlawful standard. App. 52a, 56a-65a, 68a-71a. The court of appeals addressed these two findings in turn. First, the court affirmed the trial court's finding of potentially irreparable harm. App. 23a-24a.

Second, for various reasons the court found no basis to overturn the finding of an unlawful policy. Plaintiffs alleged the systematic application of an unlawful standard. Defendant himself

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[5/] The sole references in the entire Petition are (1) a citation to the page numbers, Pet. 10, and (2) a brief reference to the finding of irreparable harm, Pet. 18.

admitted that his published ruling could be "misinterpreted" as embodying that very standard and that at least "some adjudicators" had been systematically employing the unlawful standard. App. 24a.

In addition, the court interpreted its own pain cases as meaning exactly what the district court had found them to mean: the Secretary was failing ". . .to follow the proper pain standard. . ." App. 24a; 58a-59a. The court also construed its own

100% reversal rate[6/] as probative of the existence of an unlawful standard, of a "procedural irregularity" such as that identified in Mental Health Association of Minnesota v. Heckler, 720 F.2d 965, 970 (8th Cir. 1983). App. 24a-25a. The court stated that class members whose cases had been decided before July 17, 1984, and had

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[6/] Although not available at the time, district court statistics confirm the extraordinarily high reversal rates. Nationally during this period district courts were reversing or remanding 86% of cases and affirming only 14%. OHA Fact Sheet for Fiscal Year 1984, at 6, Social Security Administration, Office of Hearings and Appeals, SSA Pub. No. 70-039, May 1985. Compare Mental Health Association of Minnesota v. Heckler, 720 F.2d 965, 970 (8th Cir. 1983). (80% reversal rate). In view of the raging controversy which was well known to judges, magistrates and counsel, it is likely that the reversal rate for the class at least equaled the national statistics for the period.

not been re-decided, were not adjudicated under the proper standard. App. 25a.

In addition to affirming the factual foundations[7] for the preliminary injunction, the court of appeals analyzed the legal requirements of 42 U.S.C. §405(g). The court interpreted the statute on the basis of its prior decision in the seminal Mental Health litigation and on the basis of the Second Circuit's analysis in City of New York v. Heckler, 742 F.2d 729 (2nd Cir. 1984), aff'd., Bowen v. City of New York, No. 84-1923 (June 2, 1986), both of which had applied the principles enunciated in Mathews v.

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[7] The dissent felt the factual support for the existence of an unlawful policy was not so strong here as in Mental Health. App. 29a. The dissent did not suggest, however, that the finding was an abuse of discretion.

Eldridge, 424 U.S. 319 (1976). App. 21a-23a, 25a-26a.

The court found that §405(g) requires a pragmatic analysis consistent with the underlying policies of exhaustion. App. 23a. The court determined that, since class members were not seeking the award of benefits but were challenging the standards applied, their essentially procedural claim was sufficiently collateral to bring the case within the requirements of Mathews v. Eldridge. App. 26a. The court noted that the class was narrowly tailored to conform to the sixty day requirement of §405(g) and remanded to provide a notice relief to class members who still claimed to be disabled and had not been readjudicated. App. 26a-28a.

The Secretary filed a petition for a writ of certiorari, which this Court held pending its decision in Bowen v. City of New York. In City of New York, this Court analyzed the requirements of §405(g) in the same way as had the court of appeals. The Court subsequently granted certiorari in this case, vacated the judgment and remanded for reconsideration in light of City of New York.

In a subsequent order the court of appeals, through a now unanimous panel,[8] held that there was no reason to amend the majority's prior opinion. App. 1a-2a.

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[8] Prior to City of New York the panel had been divided. App. 28a-29a. In addition, three (3) judges had originally voted to grant rehearing en banc. App. 101a. After City of New York, however, the petition for rehearing en banc was denied unanimously. App. 3a.

C. The Class Scope and the Relief.

The relief below involves a notice and an opportunity for readjudication for class members who continue to claim they are disabled. App. 27a-28a. The Secretary says that this will require him to reopen the claims of approximately 8,000 class members, Pet. at 12. That estimate, however, is predicated on significant analytical errors. This figure (the same estimate used below) erroneously assumes (1) that no class members have been reevaluated, and (2) that all persons who receive a notice will request reevaluation. Yet the Secretary admits these assumptions are incorrect. Resp. App. 7ra-8ra.

The data show that from 43% to 71% of persons denied benefits will have been

readjudicated on appeal.[9] "Table 4.-Disability Determinations and Appeals, Fiscal Year 1985", in Background Materials and Data on Programs Within the Jurisdiction of the Committee on Ways and Means, Committee on Ways and Means, U.S. House of Representatives, March 3, 1986. And in other disability class actions only

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[9] Pursuant to counsel's request for summary data under the Minnesota Data Practices Act, the Minnesota Disability Determination Service performed a computer search which showed how many initial application denials entered from January 30, 1984 through July 17, 1984 have been readjudicated within the DDS since July 17, 1984. The computer run showed that 49-50% of such cases had been subsequently readjudicated, whereas the national data for appeals at that level show only a 43% appeal rate. These data indicate that the national data may understate the incidence of readjudications. Thus the overall readjudication rate, rather than being "a bit" over 50% as the Secretary previously admitted, Resp. App. 7ra is more likely in the range of 55% to 60%.

20% to 25% of class members have responded to mailed notices.[10/]

Reducing class size to account for the 55% to 60% of cases which have been readjudicated yields a universe of possible class members of approximately 3,200 to 3,600. Since only those who respond to a notice must be readjudicated, the number of cases which are likely actually to be reopened under the order below is in the range of 640 to 900,[11/] a far cry from 8,000. Even for these 640 to 900

[10/] This information was provided by counsel for claimants in Lopez v. Heckler, Civ. No. 83-0698 (C.D. Cal.) (over 40,000 notices mailed to a circuit-wide class), and in Hyatt v. Heckler, 807 F.2d 376 (4th Cir. 1986) (over 10,000 notices). The 20% to 25% figure itself is in the mid-range of response rates typically experienced in class actions. See Newberg on Class Actions, 2nd ed., Vol. 2, at 207-215.

[11/] The low range is 3200 x .20; the high range is 3600 x .25.

persons (distributed among the six (6) states covered by the class), there are no requirements as to time limits and no awards of benefits. App. 27a-28a.

REASONS FOR DENYING CERTIORARI

The Secretary's principal argument in support of his petition is that the court of appeals' ruling is in conflict with City of New York. While acknowledging that there is no conflict between the ruling below and that of any other Circuit, the Secretary also cites what he refers to as a "trend of decisions" that, like the decision of the court of appeals below (as the Secretary reads it), threatens the continuing integrity of the

exhaustion requirement in social security cases, and he urges this court to act in this case to stop that "trend."

The first contention (though only the first contention) at least comes within the considerations which U.S. Sup. Ct.Rule 17 indicates may motivate this court to exercise its certiorari jurisdiction. In seeking to advance that argument, however, the Secretary is burdened by a record and a court of appeals decision that can hardly be hidden. He seeks to shed that burden by describing to this court a different case - and offering for review a different question - than the one actually presented. See Section (I). When the question actually presented is understood, it is manifest that there is no conflict between the court of appeals' decision and

City of New York. See Section (II). Finally, the "trend" the Secretary posits is mythical; there is no need for the Court to stem any tide away from the exhaustion requirement, because there is no such tide. See Section (III).

I.

NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION THE PETITION PRESENTS.

The petition repeatedly asserts that the court of appeals waived exhaustion for the claims of class members even though it affirmed the policies that had "govern[ed] those claims. . . ." Pet. 11, see also, I, 2, 10, 17. If that had happened, the court of appeals committed palpable and grievous error; and this court, rather than simply granting

certiorari, should grant certiorari and summarily reverse. In truth, however, the Secretary has blatantly misstated what the court of appeals affirmed and ignored what that court found.

The court of appeals affirmed that its own prior decisions interpreting the Social Security Act were correct and that the Secretary's regulation and ruling, when "clarified" in light of those decisions, could be sustained. The court found, however, that the Secretary had not applied those lawful policies to the class members for whom exhaustion was waived. See discussion, pp. 13-16.

The Secretary's incredible assertion that this case does not involve "a finding of an unlawful circuit-wide policy. . .", Pet. 17, rests largely on a

distortion of the settlement agreement. In the agreement the Secretary admitted that "some adjudicators" were following an unlawful policy. The Secretary now twists the admission, re-casting it as if it were the only allegation[12/] and the only finding in the case. This false premise pervades the Petition.[13/]

[12/] The "allegation" that only some adjudicators were confused was the Secretary's allegation, not the plaintiffs'. Neither plaintiffs nor the courts below were bound by the Secretary's assertions of confusion. Cf. Mental Health Association of Minnesota v. Heckler, 620 F.Supp. 261, 267 (D. Minn. 1985).

[13/] The point highlighted in the Petition actually reinforces the correctness of the decision below. The record evidence and district court findings showed that the "some adjudicators" who were systematically following an unlawful policy included the members of the Appeals Council. Given the function served by the Appeals Council, see n. 3, a reasonable inference is that "some adjudicators" includes "all adjudicators".

Such sophistry is not only essential to the Secretary's argument concerning City of New York, it is central to his ancillary arguments as well. Since this case involves findings of an unlawful system-wide policy, and not an individual (or a class) claim for benefits, cases requiring exhaustion where claimants seek such awards, and Congress' incorporation of general exhaustion principles into the Act, are not apposite. Pet. 12-15. Insofar as petitioner suggests that the 1984 Social Security Disability Benefits Reform Act of 1984 rendered the requirements of §405(g) more stringent than they were before, he continues to advance a "perverse" position. City of New York, Slip Op. at 18, n. 14. The Court, having squarely decided that issue last Term,

should not grant certiorari to decide it again.

Petitioner's misstatement of the facts and holdings also leads him to the erroneous assertion that the order below conflicts with Section 3 of the 1984 Reform Act. 42 U.S.C. §§423, 1382c. The court of appeals correctly understood the Act as implementing the policies concerning evaluation of pain which were embodied in the settlement agreement: policies which require careful individualized evaluations and a reasonable relationship between pain and objective findings, not full corroboration or a cause and effect relationship. The court of appeals waived exhaustion because those lawful policies had <u>not</u> been extended to this narrowly defined portion of the class.

II.

THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS' RULING BELOW AND THIS COURT'S DECISION IN BOWEN V. CITY OF NEW YORK.

While a conflict between a court of appeals ruling and a decision of this Court is, of course, a strong basis for the issuance of a writ of certiorari, it is only an "apparent" conflict that ordinarily leads to issuance of the writ. See United States v. Doe, 465 U.S. 605, 610 (1984), see generally, S. Stern, E. Gressman, S. Shapiro, Supreme Court Practice (6th Ed. 1986) at §4.5 (referring to a "direct" and "readily apparent" conflict). But here, there is not only no "apparent" conflict between the court of appeals ruling and City of New York, the

Secretary's contention notwithstanding, there is no conflict at all.

A. This Court's Decision in City of New York.

In Bowen v. City of New York, No. 84-1923 (June 2, 1986), this Court analyzed the §405(g) exhaustion requirement for two groups of class members. First, the vast majority of class members had failed to exhaust their administrative remedies long before the class action was filed.[14/] The clandestine nature of the Secretary's policy was sufficient to

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[14/] The class was comprised of persons whose benefits were denied or terminated from April 1, 1980 through May 15, 1983; suit was not filed until February 8, 1983. City of New York, Slip Op. 7 n. 6, 4. Persons denied or terminated from April 1, 1980 through December 5, 1982 (over 32 months), who did not appeal further, were in the first group. The second group covered a period of less than 5 1/2 months.

justify a summary waiver of exhaustion for the first group. City of New York, Slip Op. 14.

The Court analyzed the exhaustion requirement for the second group (whose claims were still alive when the class litigation was filed) differently. Secretiveness was clearly not an essential element in the Court's analysis.[15/] Far from being confined to the especially outrageous conduct of the Secretary in that case, the Court's discussion of exhaustion in City of New York sets forth the essential parameters for adjudicating cases under §405(g).

The starting point for analysis was Mathews v. Eldridge, which identified two

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15/ The Court adverted to the unrevealed nature of the policy only twice. Slip Op. 17.

factors that bear on the appropriateness of a judicial waiver of exhaustion: (1) that a claim be collateral to the claim for benefits, and (2) that full relief cannot be obtained through exhaustion. Slip Op. 14-16. In City of New York the Court squarely rejected the Secretary's exceedingly restrictive interpretation of each requirement.

First, the Court held that a claim that the Secretary failed to follow the governing rules is "collateral" to the administrative claim for benefits where claimants attack the rules themselves and do not seek an actual award of benefits. Slip Op. 15. The Court thus rejected the Secretary's assertion that only "entirely collateral" claims justify a waiver of exhaustion. Brief for the Petitioner at

35-39, Heckler v. City of New York, No. 84-1923.

Second, the Court addressed the matter of irreparable harm as an essentially factual issue. Slip Op. 15-16. The findings of irreparable harm below were accepted, contrary to the Secretary's assertion that harms associated with pursuing administrative appeals were irrelevant as a matter of Congressional intent. City of New York, Brief for Pet. at 27-29. Indeed, the Court indicated it should be "especially sensitive" to such harms, where the government seeks to require exhaustion as a prerequisite to obtaining the procedure claimants were lawfully entitled to obtain from the outset. Slip Op. 16.

More fundamentally, the Court rejected the Secretary's extraordinarily narrow and rigid overall approach to §405(g) in favor of established and familiar principles of exhaustion:

> Finally, application of the exhaustion doctrine is "intensely practical." Eldridge, 424 U.S., at 331, n. 11. . . . The ultimate decision of whether to waive exhaustion should not be made solely by mechanical application of the Eldridge factors, but should also be guided by the policies underlying the exhaustion requirement.

Slip Op. at 16.

Having established the fundamental principles underlying §405(g), the Court applied those principles to the facts. Those principles would rarely if ever allow waiver of exhaustion to attack ordinary irregularities in the processing

of an individual claim. Slip Op. 16-17. Clearly exhaustion should be waived, however, in the circumstances of City of New York, which presented the Court with an egregious injustice. Slip Op. 17.

Finally, the Court addressed the appropriate form of relief. Requiring that the Secretary merely reopen claims administratively and readjudicate cases under proper standards was entirely appropriate and did not constitute an undue interference with the administrative process. Slip Op. 17.

B. The Court of Appeals' Interpretation of §405(g) was Identical to City of New York.

Petitioner's suggestion of a conflict studiously and inappropriately omits citation to the critical portions of

the decision below. U.S. Sup. Ct. Rule 21.5. Contrary to the Secretary's assertions, the court of appeals in this case not only determined that the Secretary had been applying an unlawful standard, it interpreted and applied the requirements of §405(g) precisely as did this Court in City of New York.

First, the Eighth Circuit understood that the challenge to an unlawful standard is substantially "collateral" to an individual claim for benefits, App. 26a, under the first of the two Mathews v. Eldridge factors. That is the very holding of City of New York on that point, Slip Op. 15, and only by misstating the findings below can the Secretary suggest a conflict. Pet. 17.

Second, the court of appeals affirmed the findings of irreparable harm caused both by the denial of benefits and by pursuit of the administrative process. App. 23a-24a. As in City of New York, those findings are not challenged on appeal.[16/]

[16/] The courts below found, inter alia, that claimants experienced an increase in anxiety and depression and that their conditions worsened. These findings are appropriate, not only because they are unchallenged, but also because the class includes many mentally ill individuals.

The Secretary below interpreted the class to include all mental illness denials. In addition, there is likely to be a substantial mental illness component in many of the pain denials; indeed, the Secretary deferred issuance of certain revised mental illness listings because that very matter was included in the pain study mandated by Congress. 50 Fed. Reg. 35038, 35051, August 28, 1985.

Rather than challenge the findings, the Secretary brazenly misstates them as follows:

> In this case, by contrast, neither court below found that pursuit of the administrative review process would itself cause harm to the instant plaintiffs. Pet. 18.

This is simply a falsehood, App. 23a-24a; 68a-69a; the Secretary's entire argument as to irreparable harm founders on the holdings below.

Third, the Eighth Circuit correctly understood the proper perspective for evaluating §405(g) and the Eldridge factors. The lower court's construction of the statute as requiring a "rather pragmatic" approach, App. 22a-23a, was prescient of this Court's determination to follow an "intensely practical" course.

Slip Op. 16. The Eighth Circuit considered no one Eldridge factor to be critical; this Court held the Eldridge factors should not be mechanically applied. Compare App. 23a with Slip Op. 16. Clearly the essential and important principles of law applied here and in City of New York are the same.

C. The Court of Appeals' Waiver of Exhaustion was Entirely Consistent with City of New York.

Not only does this case involve an unlawful policy inflicting irreparable harm, but many of the additional factual characteristics which this Court noted in City of New York are also present here.

As in City of New York, it is clear that the unlawful policy was inconsistent "in critically important ways", Slip Op.

17, with the established law of the circuit and with the Social Security Act. This was not an insignificant, ancillary or usually harmless policy; rather, it went to the heart of the disability decision-making process. Where the courts determined that the unlawful policy had been followed, they had been required to reverse or remand cases to the Secretary again and again. Layton v. Heckler, 726 F.2d 440, 442 (8th Cir. 1984).

As in City of New York, too, the policy was illegal precisely because it ignored the particular facts of the

individual cases.[17] The unlawful pain standard provided adjudicators with a simplified litmus test, a bottom line rule, to decide pain issues; and adjudicators repeatedly distorted, ignored or failed to develop the facts. Layton, 726 F.2d at 442; Tome v. Schweiker, 724 F.2d 711, 713 (8th Cir. 1984); Basinger v.

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[17] Indeed, the presumption invalidated in City of New York and Mental Health was a particularized application of the general rule involved here. The former mental impairment listings focused solely on the "objective" psychiatric "signs" and "findings", and the unlawful presumption required disability to be based solely on that "objective" basis by determining that anyone who did not meet the listings was capable of substantial gainful employment. The mental impairment presumption thus sought to remove consideration of subjective symptomatology which could not be clearly proved from objective findings in much the same way that the "full corroboration" rule sought to remove consideration of pain or other complaints which could not be entirely explained by objective findings.

Heckler, 725 F.2d 1166, 1170 (8th Cir. 1984); Nelson v. Heckler, 712 F.2d 346, 348 (8th Cir. 1983). The effect of the unlawful rule was to deny claimants the searching and individualized analysis based on the full record to which they were entitled.

This case also presents compelling reasons for waiving exhaustion beyond those which were present in City of New York. Here the Secretary's refusal to follow the law of the circuit precipitated a genuine crisis[18/] which rendered exhaustion both futile and unjust.

Because of the Secretary's non-acquiescence, which had been openly

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18/For example, in response to the Secretary's policies, the Governor of the State of Arkansas, acting in defiance of the Secretary's instructions, directed the Arkansas DDS to follow Eighth Circuit law.

assailed by the court of appeals itself, App. 58a-59a, the adjudicative system was burdened with unprecedented levels of appeals and reversals. This result was extraordinarily wasteful and costly to the administrative system. It imposed unwarranted costs, delay and anxiety on claimants and required an unnecessary diversion of advocacy resources. It also resulted in an undue imposition on the scarce resources of the federal courts.

In addition to imposing costs in terms of delay and money, the policy undermined the rule of law. Public confidence in the federal government and in the fairness of the adjudicative system was compromised. Cf. H.R. Rep. 98-616, 98th Cong., 2nd Sess. (1984) at 2, 24-25. In addition, the Secretary's conduct resulted

in a dual system of laws, one system for those with the resources or determination to pursue appeals, and a different system for the uneducated, the unrepresented or the meek.

The implications of this crisis with respect to the question of exhaustion are three-fold. First, because many individuals or advocates were aware of the furor, large numbers of individuals did appeal their cases. The scope of the class for whom the exhaustion issue is critical is correspondingly limited.

Second, those who did allege significant pain not fully corroborated by objective tests, and who did not exhaust their administrative remedies, are most likely to be the uninformed, the unrepresented and the emotionally or

mentally impaired.[19] Since the Social Security system was designed to be unusually protective of the rights of such claimants, City of New York, Slip Op. 11-12, a waiver of exhaustion for a limited group of such persons is entirely consistent with the fundamental purposes of the Act.

Third, since the Secretary was put on notice of the unlawful policy by the court of appeals itself over eight (8) months before the class claims were filed, Nelson, 712 F.2d at 346, every member of the class could have been lawfully adjudicated from the outset had the Secretary

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[19] The Secretary does not allege that he informed such claimants of his unlawful policy (which he denies ever existed), and the assertion that such individuals "knowingly" abandoned their claims is particularly unwarranted.

simply responded appropriately. Instead, the Secretary waited to act until faced with a circuit-wide class. Here waiver of exhaustion requires only that the Secretary take corrective measures which he both could and should have initiated on his own with respect to these very class members. Compare City of New York, Slip Op. 17.

The Court has directed that exhaustion principles be applied in an "intensely practical" manner. City of New York, Slip Op. 16. Considering the finding of irreparable harm, the finding of a system-wide policy, the critically important impact of that policy on disability decisions, the circumvention of the individualized review to which individuals are entitled, and the extra-

ordinarily wasteful and unjust results of the Secretary's conduct, the court of appeals acted well within the range of its broad discretion in waiving exhaustion for a very narrow class.

D. The Scope of Relief Ordered Below Was Entirely Consistent With City of New York.

The relief ordered in this case is far less intrusive than that awarded in City of New York, for it involves no interim benefits and only a notice/opt-in procedure.[20] App. 27a-28a.

This relief was particularly appropriate because it effectively terminated further litigation over a constitu-

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[20] City of New York (and Mental Health before it) required not only interim benefits but also the affirmative reopening of all cases, regardless of whether class members responded to a notice.

tional confrontation between the Secretary and the courts and did so in the least intrusive manner possible. Here, the court of appeals not only took the unusual step of urging the parties to settle and avoid the constitutional conflict, its subsequent opinions leave no doubt that the court was directing that the matter should be considered resolved once notice relief was extended to the limited portion of the class which remained. App. 26a-28a; Resp. App. 1ra-3ra. By thus allowing the case to become moot without requiring an ultimate confrontation over the issue

of non-acquiescence,[21] the court of appeals was acting in the highest tradition of judicial restraint.

The alternative to notice relief would have been a remand for complete discovery and a trial concerning weighty and

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[21]Of course, the Secretary remains free to attempt to insist on a constitutional showdown on remand, if he wishes to do so. Numerous factors might induce the Secretary to act with restraint, including (1) the numbers of persons responding to notice relief will be small, as the Secretary well knows; (2) the cost of circuit-wide discovery may be substantial; (3) Chief Judge Alsop (to whom the case is now assigned) will have broad authority over the content and timing of discovery and the timing of trial; (4) if the Secretary insisted on trial, he might open up the issue of tolling the 60-day statute of limitations; and (5) the Secretary himself may wish to avoid ultimate constitutional issues. That the Secretary's choice is a difficult one, however, does not argue for a grant of certiorari. It goes without saying the Court should not grant certiorari in order to simplify a party's tactical litigation decisions, especially when that party has not sought certiorari on that basis.

far-reaching constitutional questions. In addition, the prospective settlement had already rendered the dispute moot for the great majority of the class, further diminishing the appropriateness of such proceedings.

This court rarely reviews questions of the scope of preliminary injunctions, and where it does so the question "is simply whether the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion." Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975). The relief granted was as narrow as possible.[22/]

[22/] More intrusive forms of relief not ordered below but which have been awarded in some other actions include: (1) mandatory reopening of all files; (2) judicial imposition of time limits, (3) interim benefits, and (4) tolling the 60 day statute of limitations.

The court of appeals unquestionably applied the correct legal standards; and its handling of this case, and the relief it allowed [23], were nothing if not intensely pragmatic. Every judge on the court of appeals considers what little remains of this case to be inappropriate for further review. Respondents submit that there is no basis whatsoever for holding that the court of appeals abused its broad discretion in ordering notice relief. That court's wise and restrained order should be left undisturbed.

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[23] The court of appeals significantly curtailed the relief which had been ordered by the district court. Compare App. 27a-28a and App. 76a-84a.

III.

THERE IS NO "TREND" OF DECISIONS THAT IS UNDERMINING THE INTEGRITY OF THE EXHAUSTION REQUIREMENT IN SOCIAL SECURITY CASES.

This Court's decision in City of New York grounded §405(g) jurisprudence upon the well-established principles governing application of the exhaustion doctrine in other contexts. The federal courts are experienced and expert in applying these principles, and there is little or no reason to believe that a substantial or erroneous "trend" of decisions has developed or will develop after City of New York.

Not only is there no conflict in the circuits as to any exhaustion issue this case presents, Pet. 23, there is not

even a conflict between any circuits and any district courts. The Secretary's suggestion that all the lower courts are misinterpreting City of New York argues against a grant of certiorari. It is one thing to suggest that one or a few lower courts are misconstruing a Supreme Court decision; it is a different thing entirely to claim that all the federal courts which have decided the issue are wrong. It is far more likely that it is the Secretary who is mistaken, either about City of New York or about the decisions below.

In fact, there has been a singular paucity of litigation over §405(g) issues since City of New York. The few disability cases which have been decided certainly do not evidence any wholesale tendency of the courts to depart from

settled rules of exhaustion. Hyatt v. Heckler, 807 F.2d 376, 378 (4th Cir. 1986) (exhaustion will rarely be appropriate); Salyers v. Secretary, 798 F.2d 897 (6th Cir. 1986) (dismissing class claims as moot); Hironymous v. Bowen, 800 F.2d 888, 893 (9th Cir. 1986)(refusing to waive exhaustion); and Pratt v. Bowen, 642 F.Supp. 883, 887 (D.D.C. 1986)(affirming prior decision to waive exhaustion).[24/] This is hardly the time to re-visit the principles so clearly enunciated by a unanimous Court last Term.

[24/] In addition to the reported cases, respondents are aware of one unreported case touching these issues. Knight v. Bowen, No. 82-892(K) (D.C. Mass. November 24, 1986)(Keeton, J.). That case turned on the unique fact that the class was comprised of the oldest of SSI beneficiaries, many of whom would die before they could exhaust, and the issue was simply a question of law. Slip Op. 7-9.

Finally, even if there were a trend such as the Secretary claims, this is not an appropriate vehicle for review of the trend. This case arises from a preliminary injunction, and the factual issues are necessarily less fully developed than would be true of other cases. The scope of relief in this case which would result from the waiver of exhaustion (i.e. the reevaluation of some 100 cases per state) simply does not warrant Supreme Court review, particularly where review can only serve to unearth a constitutional confrontation that is best left buried.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 1987 ATTORNEY FOR RESPONDENTS

RESPONDENTS' APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 84-5085

Lorraine Polaski, et al.,

Appellees,

-vs-

Margaret M. Heckler, Secretary of Health and Human Services,

Appellant.

On Appellees' Motion for Costs and Attorneys' Fees.

Filed March 1, 1985

Before HEANEY, JOHN R. GIBSON and FAGG, Circuit Judges.

O R D E R

On December 31, 1984, this Court issued its final opinion on this lengthy

litigation concerning the construction of the Social Security Act by the Secretary of Health and Human Services (Secretary). Polaski v. Heckler, 751 F.2d 943 (8th Cir. 1984). The plaintiffs now seek attorneys' fees and costs under the Equal Access to Justice Act, 28 U.S.C. §2412(b) & (d).

We find an award for attorneys' fees and costs appropriate under section 2412(d), which provides that fees and costs shall be payable to a prevailing party

> in any civil action * * * brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances made an award unjust.

28 U.S.C. §2412(d)(1)(A).

In this litigation, the plaintiffs succeeded in gaining significant relief for a large class of Social Security disability benefits claimants. Their lawsuit was the catalyst for resolution of a controversy over the Secretary's evaluation of pain and other subjective complaints--a controversy in which the Secretary had been reserved by our Court time after time, and failed ever to appeal our decisions to the United States Supreme Court.

To this degree, we find the Secretary's position in this litigation was not substantially justified, see Cornella v. Schweiker, 728 F.2d 978, 981-85 (8th cir. 1984), and that attorneys' fees and costs should be awarded to plaintiffs to reflect this

degree of success, see Hensley v. Eckerhart, 103 S.Ct. 1933, 1939 (1983). We limit the attorneys' fee award to $75 per hour pursuant to section 2412(d)(2)(A). We note further that a significant portion of the time spent in this appeal by plaintiffs' attorneys reflects work on the medical improvement issue, for which it cannot be said that the plaintiffs prevailed or that the Secretary's position was not substantially justified. We thus reduce the attorneys' fees award by one third to reflect the plaintiffs' overall degree of success. Thus, the total attorneys' fees award is $7,752. We also grant an award of costs of $335.

FAGG, Circuit Judge, dissenting.

Because I believe the Secretary's position in this litigation was

substantially justified, I dissent from this order.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

LORRAINE POLASKI, et al.		
Plaintiffs-Appellees,	*	
	*	
vs.	*	NO. 85-5085
	*	(D. Minn. Civ.
	*	Action No. 4-
MARGARET M. HECKLER,	*	84-64)
Secretary of Health	*	
and Human Services,	*	
	*	
Defendant-Appellant.	*	

AFFIDAVIT OF JEAN HALL HINCKLEY

STATE OF MARYLAND :
:ss.
COUNTY OF BALTIMORE:

I, Jean Hall Hinckley, being duly sworn according to law, depose and say as follows:

1. I am the Acting Deputy Associate Commissioner for Disability, Office of Disability, Social Security Administration, Baltimore, Maryland.

* * * * * * *

[PARAGRAPHS 2-15A HAVE NOT BEEN INCLUDED IN THIS APPENDIX.]

15B. In paragraph 8, Mr. Bohnhorst states his belief that the appellate filing rate averages 50% or a bit more. We do not disagree with his belief. We do disagree, however, with his assumption that the total number of cases to be reworked is equivalent to one-half of those recently adjudicated. While we agree that one-half of those would have to be readjudicated anyway, there is an additional body of cases (those who are not pursuing their appeal rights) which must be addressed. Thus, Mr. Bohnbhorst has understated the total number of potential claims requiring reworking.

* * * * * * *

[PARAGRAPHS 15C AND 15D HAVE NOT BEEN INCLUDED IN THIS APPENDIX.]

15E. In his paragraph 11B, Mr. Bohnhorst is critical of SSA's estimates based on 100% of cases. Our estimates are done with the idea of letting courts know the maximum impact of an order. We do not disagree that it is reasonable to expect less than 100% response to our notices.

* * * * * * * *

[PARAGRAPHS 15F-17 HAVE NOT BEEN INCLUDED IN THIS APPENDIX.]

18. The information contained in this affidavit was secured by various employees of the Social Security Administration and is true and correct to the best of my information and belief.

Jean Hall Hinckley
JEAN HALL HINCKLEY
Acting Deputy Associate
Commissioner for
Disability
Office of Disability
Social Security
Administration

Subscribed and sworn to before

me this 18th day of May, 1984.

/s/
Notary Public

My Commission Expires July 1, 1986.

Supreme Court, U.S.
FILED
JUN 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1617

In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

LORRAINE POLASKI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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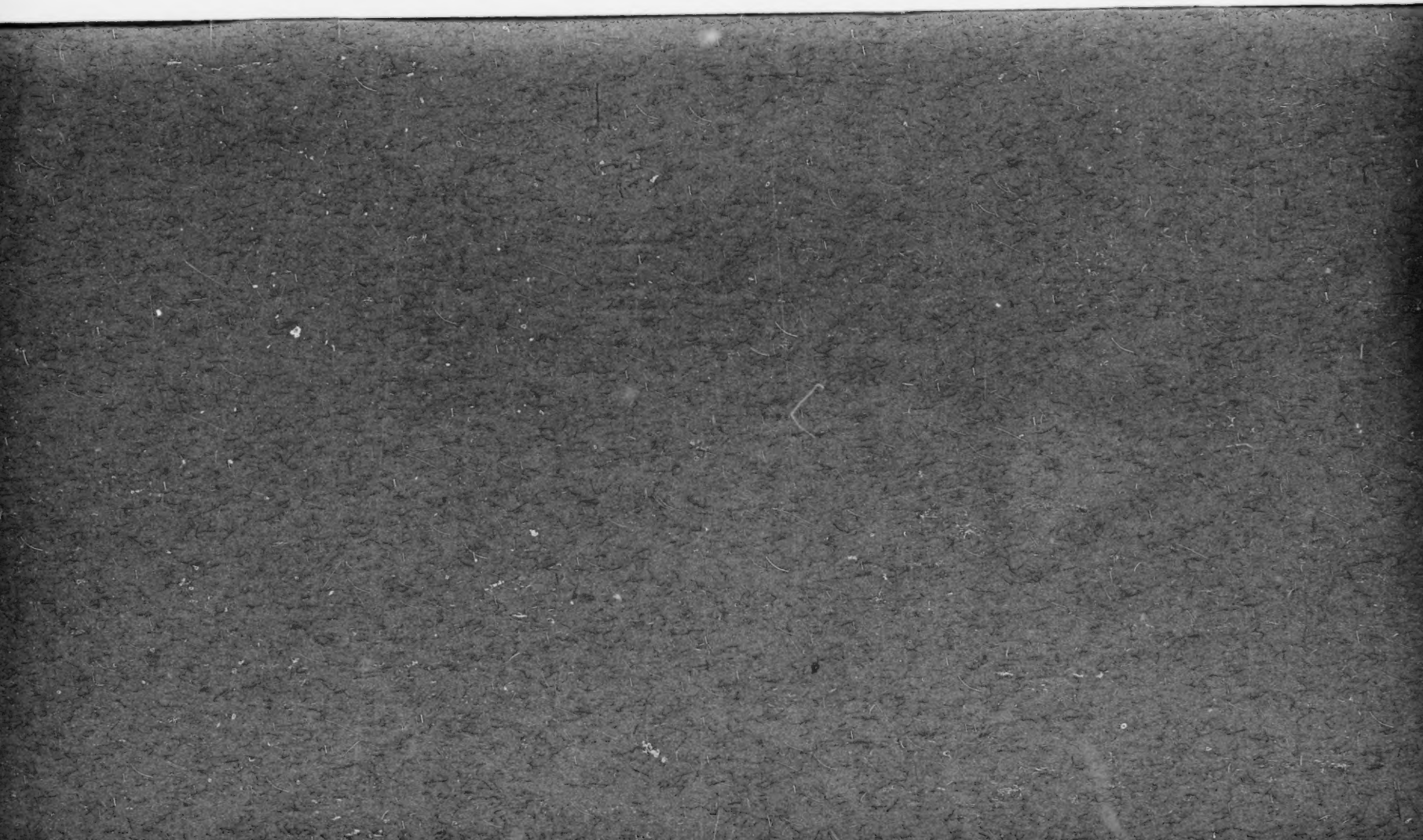


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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1617

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

LORRAINE POLASKI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

1. Respondents concede (Br. in Opp. 24) that it is "palpable and grievous error" for a court to order the reopening of closed claims where the court has sustained the Secretary's policies governing decision of those claims. Accordingly, respondents state (Br. in Opp. 24-25) that if the Eighth Circuit is found to have ordered class-wide reopening relief in this case while approving the Secretary's policies concerning the evaluation of pain, "this [C]ourt, rather than simply granting certiorari, should grant certiorari and summarily reverse." Since that is precisely what the court of appeals has done, we agree with respondents that this error warrants the grant of certiorari.

Respondents seek to avoid that consequence by arguing that the court of appeals did not actually sustain the Secretary's pain policies and that its reopening order is justified because the Secretary had applied unlawful policies and standards on a system-wide basis. See Br. in Opp. 2, 4, 10, 13, 15, 25-26, 27, 36, 39-41, 46. Respondents are wrong. Although the district court held that the

Secretary's official policies regarding the evaluation of pain were unlawful (Pet. App. 59a-65a), the court of appeals held that the relevant regulatory provisions were consistent with the Social Security Act and Eighth Circuit precedent and had been ratified by Congress (*id.* at 19a-20a).

The Secretary's "policies" and "standards" that bind decision-makers in their evaluation of pain are set forth in 20 C.F.R. 404.1529 and Social Security Ruling (SSR) 82-58.[1] It was accordingly upon that Regulation and Ruling that respondents focused their challenge, and the district court concluded that both provisions were inconsistent with Eighth Circuit precedent (Pet. App. 59a-63a). In particular, the district court believed that even the reference in 20 C.F.R. 404.1529 to a "reasonable" relationship between the impairment and the alleged severity of the pain was impermissible under Eighth Circuit decisions (Pet. App. 60a).

The validity of 20 C.F.R. 404.1529 and SSR 82-58 also was the central issue on the merits in the court of appeals. Thus, respondents' argument that the Secretary's pain policies were unlawful and inconsistent with Eighth Circuit precedent rested on the premise that 20 C.F.R. 404.1529 and SSR 82-58 were invalid, and that the

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[1] 20 C.F.R. 404.1529 states that a claimant will not be found disabled based on his symptoms, including pain, "unless medical signs or findings show that there is a medical condition that could be reasonably expected to produce those symptoms." SSR 82-58 in turn states that "[s]ymptoms can sometimes suggest a greater severity of impairment than is demonstrated by objective medical findings alone" and that "[t]he effects of symptoms must be considered in terms of any additional physical or mental restrictions they may impose beyond those clearly demonstrated by the objective physical manifestations of disorders" (Gov't C.A. Br. Addendum D at 3). SSR 82-58 further explains that because pain and other symptoms are subjective and cannot be quantified, any functional limitations attributable to symptoms must be inferred from objective physical findings, medical knowledge of expected symptom-related effects, the alleged frequency and duration of the pain, precipitating and aggravating circumstances, the claimant's daily activities, effects of medication, and recorded observations by physicians and disability decision-makers (*ibid.*).

Appeals Council therefore had erred by relying on those provisions in several recent cases. Resp. C.A. Br. 21-31. The Secretary, on the other hand, argued that 20 C.F.R. 404.1529 and SSR 82-58 were consistent with Eighth Circuit precedent because they required that serious consideration be given to subjective complaints of pain even where such complaints were not fully supported by objective medical evidence. Gov't C.A. Br. 18-21, 25-26.

After oral argument, the Secretary and respondents entered into an agreement on the pain issue, which the court of appeals approved in July 1984 as consistent with circuit precedent (Pet. App. 30a-34a). Significantly, the agreement did *not* state that 20 C.F.R. 404.1529 and SSR 82-58 were invalid, as respondents theretofore had maintained and as the district court had held. To the contrary, the agreement quoted and paraphrased SSR 82-58 as setting forth the governing principles (Pet. App. 32a-33a), while stating that "some adjudicators" had "misinterpreted the Secretary's policies as enunciated in SSR 82-58" (Pet. App. 32a). The necessary premise of this statement was that the Secretary's policies were *valid* and that any errors in the past were attributable to deviations from those policies in the adjudication of particular cases.

The July 1984 agreement, which respondents voluntarily joined and the court of appeals approved, thus conclusively refutes respondents' central contention before this Court—that the court of appeals' reopening order was justified because of an unlawful, system-wide policy governing the evaluation of pain. The court of appeals in fact made no mention of *any* policy, unlawful or otherwise, in its opinion requiring reopening following the remand from this Court for further consideration in light of *Bowen* v. *City of New York*, No. 84-1923 (June 2, 1986) (see Pet. App. 1a-2a). And although the court of appeals' December 31, 1984 opinion on the exhaustion issue did note respondents' *contention* that adjudicators at every level had applied an improper standard (*id.* at 24a), the court expressly held that 20 C.F.R. 404.1529 and SSR 82-58 were valid and had been ratified by Congress (Pet.

App. 19a-20a), and it merely quoted the agreement's reference to errors by "some adjudicators" in interpreting those policies (*id.* at 24a).

As respondents concede, a court has no authority to order the reopening of closed claims where, as here, the policies governing those claims are found to be lawful. This Court made clear in *City of New York* that exhaustion may not be excused even in an individual suit under 42 U.S.C. 405(g) if the plaintiff "alleg[es] mere deviation from the applicable regulations in his particular administrative proceeding," since "such individual errors are fully correctable upon subsequent administrative review" (slip op. 16-17). *A fortiori*, in a class action, a court has no authority to order the reopening of *all* individual claims on the ground that errors might have occurred in the application of valid regulations to *some* individual claims by *some* SSA decision-makers. Cf. *ICC* v. *Brotherhood of Locomotive Engineers*, No. 85-792 (June 8, 1987), slip op. 6-8.

2. Respondents also ignore the significance of Congress's ratification of 20 C.F.R. 404.1529 and SSR 82-58 when it enacted Section 3 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 86-460, 98 Stat. 1799. Compare *Bowen* v. *Yuckert*, No. 85-1409 (June 8, 1987), slip op. 11-14. As we have explained (Pet. 21-22 & nn. 11-12), Congress acted for the specific purposes of overturning judicial decisions that had attached too much weight to subjective complaints of pain and of terminating then-pending judicial challenges to the Secretary's pain policies, including this very case. The holding below that the Secretary nevertheless must provide for the reopening of thousands of claims that were governed by the policies that Congress ratified is completely inconsistent with this considered legislative judgment.

Respondents refer to Section 3 of the 1984 Act only in passing, stating that it "implement[s] the policies concerning evaluation of pain * * * embodied in the [July 1984] settlement agreement," policies that "require careful individualized evaluations and a reasonable rela-

tionship between pain and objective findings" (Br. in Opp. 28). But that is exactly what 20 C.F.R. 404.1529 and SSR 82-58 had required all along, even before the parties entered into the settlement agreement (see page 2 & note 1, *supra*), and it was those regulatory provisions (not the settlement agreement) that governed respondents' claims and that Congress ratified in 1984. This ratification contrasts sharply with Congress's disapproval of the Secretary's approach to the evaluation of mental impairments, at issue in *City of New York*. See Pet. 20-21.

3. Respondents' attempts to reconcile the decision below with *City of New York* (see Br. in Opp. 29-42) are flawed in other respects as well. First, *City of New York* makes clear that exhaustion may be dispensed with only in "unique circumstances" (slip op. 17). Yet respondents have not shown that this case is unique in *any* respect that would warrant the mandatory reopening of thousands of defaulted claims. To the contrary, the court of appeals' and Congress's approval of 20 C.F.R. 404.1529 and SSR 82-58 renders this case uniquely *inappropriate* for such relief.

Second, respondents do not dispute our submission (Pet. 11, 16-17) that here, unlike in *City of New York*, the challenged policies were not "unrevealed" or "secret" (slip op. 17), such that the Secretary might be held responsible for the class members' failure to seek administrative review. Respondents attempt to downplay this important difference by contending (Br. in Opp. 31) that secretiveness was not "an essential element in the Court's analysis" in *City of New York*. But as respondents concede (Br. in Opp. 31 n.15), this Court *twice* referred to the secret nature of the challenged policy in its exhaustion ruling in *City of New York*. Indeed, the Court stated that the claimants there "[stood] on a different footing from one arguing merely that an agency incorrectly applied its regulations" precisely because "the District Court found a systemwide, *unrevealed policy* that was inconsistent in critically important ways with established regulations" (slip op. 17 (emphasis added)).

Third, contrary to respondents' contention (Br. in Opp. 37-38), this case differs from *City of New York* with respect to the possible hardship to claimants. The courts below relied on the financial hardship that class members might experience as a result of the denial of their claims (Pet. App. 23a-24a, 68a-71a). But as Congress well knew, virtually any disappointed claimant might make such an allegation, and yet Congress incorporated the administrative appeal process, including the exhaustion requirement, into the disability programs. See Pet. 14-15. By contrast, the Court in *City of New York* observed that the "class members *not only* were denied the benefits they were seeking," but also that " '[t]he ordeal of having to go through the administrative appeal process may trigger a severe medical setback' " (slip op. 15 (emphasis added; citation omitted)). In this case, there was no such finding that pursuit of administrative remedies would itself cause injury.

Fourth, respondents err in seeking to derive support from *City of New York* for the notion (Br. in Opp. 36) that the legal issues raised by the class members here were "substantially collateral" to their claims for benefits in the same manner as the asserted right to a pretermination hearing was found to be "entirely collateral" to the claim for benefits in *Mathews* v. *Eldridge*, 424 U.S. 319, 330 (1976). The latter was a classic example of an issue that was "completely separate from the merits of the action" under the collateral-order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 473 (1978). By contrast, neither respondents' challenge to the weight attached to subjective complaints of pain in the adjudication of their claims on the merits, nor their contention that the decisions denying their claims on the merits should now be reopened, is "entirely" or even "substantially" collateral to their claims for benefits. The Court in *City of New York* did observe that the contentions advanced on behalf of the class members there were "collateral" in the sense that they did

not actually ask the court to award them benefits, but rather challenged the Secretary's failure to follow applicable regulations (slip op. 15). But the Court did not suggest that that characterization would suffice to permit a court to order the reopening of closed claims. If such a characterization did suffice, there would never be repose in the disability programs, so long as a class of claimants refrained from seeking an actual award of benefits from the court.[2]

4. Respondents also contend (Br. in Opp. 42-50) that this case presents "compelling" reasons for judicial waiver of the exhaustion requirement because the Secretary allegedly "refus[ed]" to follow Eighth Circuit precedent regarding the evaluation of pain. This contention is frivolous. The district court did believe that 20 C.F.R. 404.1529 and SSR 82-58 were inconsistent with Eighth Circuit precedent, and it ordered the Secretary to reopen closed claims on that basis (Pet. App. 58a-65a). But as the Secretary argued on appeal (Gov't C.A. Br. 23-27), the Regulation and Ruling in reality were fully consistent with Eighth Circuit precedent. The fact that the Eighth Circuit had reversed a handful of SSA decisions involving pain, out of the thousands of such decisions rendered within that circuit, showed only that valid policies had been misapplied by some adjudicators in individual cases. Indeed, in all of the cases cited by respondents and the courts below (Pet. App. 24a-25a, 56a-57a), the district court had *affirmed* the Secretary's denial of benefits,

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[2] Contrary to respondents' contention (Br. in Opp. 41-42 & n.17, 46), the Secretary's policies concerning the evaluation of pain bear no resemblance to the policy concerning mental impairments at issue in *City of New York*. There, the Court found that the state agency had applied a conclusive presumption that mentally impaired claimants who did not meet or equal the listings retained sufficient residual functional capacity to do at least unskilled work. In this case, by contrast, the governing Regulation and Ruling provided for an individualized assessment of pain, based on the claimant's subjective complaints, objective medical evidence, precipitating and aggravating circumstances, and the claimant's daily routine, medication and demeanor.

thereby refuting the notion that those cases represented instances of deliberate "non-acquiescence" in clearly established circuit law.

More importantly, the question of the consistency between the Secretary's policies and Eighth Circuit precedent was rendered moot by Congress's ratification of the Secretary's policies when it passed Section 3 of the 1984 Act. See pages 4-5, *supra*. Congress specified in Section 3(a)(3) that the statutory pain standard (and therefore the administrative policies it ratified) "shall apply to determinations made prior to January 1, 1987" (98 Stat. 1799). The regulatory policies that respondents challenged thus were approved and made applicable by statute to the claims of the class members at issue here. Whether the Secretary's policies for the evaluation of pain were consistent with Eighth Circuit decisions construing the Social Security Act prior to passage of the 1984 Act therefore is irrelevant. Even the court of appeals observed that as a result of Congress's ratification of 20 C.F.R. 404.1529 and SSR 82-58 and the court's own approval of the settlement agreement in July 1984, "there is no longer a question of nonacquiescence on the part of the Secretary" (Pet. App. 20a).[3]

5. There likewise is no merit to respondents' suggestion (Br. in Opp. 50-51, 55) that the Court should deny review because only a preliminary injunction has been entered in this case. The court of appeals did not rely on the so-called "preliminary" nature of the relief ordered by the district court. The requirement that the Secretary reopen thousands of closed claims obviously goes far beyond "the usual 'prohibitory' injunction which

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[3] In any event, as we explain in our petition for a writ of certiorari (at 16-17) in *Bowen* v. *Hyatt*, No. 86-1861 (filed May 22, 1987), whatever policy considerations may bear on the matter, the Constitution does not inflexibly mandate that the Secretary apply a court of appeals' legal reasoning in a single decision involving an individual claimant to the adjudication of the claims of *all* individuals in the circuit. The effect of such a rule would be to convert every individual disability case into a class action, but only if the claimant wins.

merely freezes the positions of the parties until the court can hear the case on the merits." *Heckler* v. *Lopez*, 463 U.S. 1328, 1333 (1983) (Rehnquist, Circuit Justice).

6. Finally, respondents err in attempting to minimize the importance of this case. They argue (Br. in Opp. 21), for example, that not all class members will actually request that their claims be readjudicated.[4] But respondents do not dispute that many *will* request readjudication in response to the notices the court of appeals has ordered to be sent, and the scope of the relief must in any event be measured by the Secretary's legal obligation to the class as a whole. Moreover, even if some class members ultimately do not respond, the Secretary must bear the substantial and unwarranted threshold burden of identifying and notifying thousands of class members of their right to readjudication.

In a related vein, respondents argue (Br. in Opp. 19-20) that the number of claimants who must be afforded an opportunity to have their claims readjudicated is less than the 8000 estimated in the petition (Pet. 8, 22), because some of those 8000 individuals, who received initial determinations denying their claims during the period defining class membership, might have sought administrative review and had their claims properly resolved after July 17, 1984. Respondents overlook the fact that any such reduction would be offset by the inclusion of additional claimants who received initial determinations prior to the class period but whose claims were again denied on administrative appeal during that period. The relief for the class members in this case (and the 9500 claimants

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[4] Relying on experience in two of the numerous medical improvement class actions (see Br. in Opp. 21 n.10), respondents estimate that between 20% and 25% of the affected class members would request readjudication in response to a notice. However, we have been informed by HHS that the response rate has been far higher—approaching or even exceeding 50%—in certain other class actions, such as the *Dixon* case in New York and the *Wilson* case in the Third Circuit, which involve challenges to the severity regulation. See *Bowen* v. *Dixon*, petition for cert. pending, No. 86-2; *Bowen* v. *Wilson*, petition for cert. pending, No. 86-897.

in the parallel *Boyd* case (see Pet. 22)) therefore represents a substantial intrusion into the administrative process.

Beyond the impact of this case alone, the decision below warrants review from a broader perspective. Respondents make no effort to rebut our submission (Pet. 22-23) that there are numerous other class actions arising under the disability programs that involve similar issues of exhaustion and the unwarranted reopening of thousands of closed claims.[5] In one of the pending cases, *Hyatt* v. *Heckler*, 807 F.2d 376 (4th Cir. 1986), which likewise involves a challenge to the Secretary's policies for the evaluation of pain, the Fourth Circuit has required the Secretary to afford an opportunity for the reopening and readjudication of an estimated 80,000 claims, even though Congress approved the challenged policies. On May 22, 1987, the Solicitor General filed a petition for a writ of certiorari seeking review of the Fourth Circuit's decision in *Hyatt*. See *Bowen* v. *Hyatt*, No. 86-1861. The questions presented by this case therefore are of broad and recurring importance.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

JUNE 1987

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[5] See, *e.g.*, *State of New York* v. *Bowen*, No. 83 Civ. 5903 (RLC) (S.D.N.Y. Jan. 21, 1987) (decision regarding evaluation of cardiovascular impairments that, when implemented, will require the Secretary to provide for the reopening of an estimated 80,000 claims); *Luna* v. *Bowen*, 641 F. Supp. 1109 (D. Colo. 1986), appeal pending, No. 86-2480 (10th Cir.) (requiring reopening of an estimated 10,000 claims in a class action challenging pain policies).

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